86-750

Supreme Court, U.S.
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No. .....

In The Supreme Court

OF THE

United States

OCTOBER TERM, 1986

SIMPSON PAPER COMPANY,
Petitioner,

v.

DIVISION OF OCCUPATIONAL SAFETY AND HEALTH OF THE DEPARTMENT OF INDUSTRIAL RELATIONS FOR THE STATE OF CALIFORNIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA IN AND FOR THE THIRD APPELLATE DISTRICT

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QUESTION PRESENTED

Whether federal labor law preempts a state agency's order where that order is contrary to the employer's collective bargaining agreement and an arbitration award under that agreement and where the order attempts to alter the economic terms of the agreement.

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceedings below are all named in the caption.

Petitioner, Simpson Paper Company, is wholly owned by Simpson Timber Company which is wholly owned by Simpson Investment Company which is wholly owned by Kamilche Company. Petitioner has no subsidiaries other than wholly owned subsidiaries. The affiliates of Petitioner are:

Commencement Bay Mill Company
Pacific Western Extruded Plastics Company
Simpson Building Supply Company
Simpson Export Sales Company
Simpson Foreign Sales Corporation
Simpson Properties, Inc.
Simpson Redwood Company
Simpson Timber Co. (British Columbia) Ltd.
Simpson Timber Co. (Saskatchewan) Ltd.
SLC, Inc.
The Arcata and Mad River Rail Road Company

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The Petitioner, Simpson Paper Company, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeal of the State of California in and for the Third Appellate District, rendered in the above-entitled proceeding on June 23, 1986.

OPINION BELOW

The opinion of the Court of Appeal in and for the Third Appellate District has not been reported. It is reprinted in Appendix A hereto, p. A-1, *infra.*

The order denying Petitioner's petition for rehearing by the Court of Appeal for the Third Appellate District has not been reported. It is reprinted in Appendix B hereto, p. B-1, *infra.*

The Order Denying Review of the Supreme Court of the State of California has not been reported. It is reprinted in Appendix C hereto, p. C-1, *infra.*

JURISDICTION

The judgment and opinion of the Court of Appeal of the State of California in and for the Third Appellate District, denying the petition for a peremptory writ of mandate, was rendered on June 23, 1986. The Court of Appeal denied a timely petition for rehearing on July 18, 1986. Thereafter, on August 28, 1986, the Supreme Court of the State of California denied a petition for review. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Clause 2 of Article VI of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 7 of the Labor-Management Relations (Taft-Hartley) Act ("LMRA"), as amended, 29 U.S.C. § 157 (1947), provides in pertinent part as follows:

> Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining . . .

Section 203(d) of the LMRA, 29 U.S.C. § 173(d) (1978), states, in part, as follows:

> Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.

STATEMENT OF THE CASE

Petitioner, Simpson Paper Company ("Simpson," the "Employer" or the "Petitioner") challenges that part of a decision of the Division of Occupational Safety and Health of the Department of Industrial Relations for the State of California (the "Division" or "Cal-OSHA") which holds that Simpson is required to pay the full cost of safety shoes purchased by employees at one of its mills. Petitioner's collective bargaining agreement at that mill requires only that Simpson pay a portion of the total purchase price of a pair of safety shoes. A labor Arbitrator likewise held that Simpson had to pay only a portion of the total purchase price of the shoes.

This case, therefore, presents the Court with an extremely important question of federal preemption. The action taken here by a state agency, attempting to maximize its own importance and role by disregarding Con-

gress' carefully balanced scheme for labor relations, makes this case truly one of national concern. It is critical that this Court grant certiorari and deal with the issues raised, for, as is apparent in this case, the state courts of this nation do not fully understand federal labor law and therefore cannot weigh correctly the importance of, and reasons for, preemption of such state activity.

The Parties' Negotiations

Simpson is a manufacturer of high grade paper. It operates a mill in Shasta, California. Simpson has had successive collective bargaining agreements with the United Paper Workers International Union, Anderson Local No. 1101 (the "Union") since 1972 (Jt. Exhs. C, D, E, F, H; Decl. of Dean Childers, p. 1, Exhs. B, C).[1]

These collective bargaining agreements have consistently required Simpson to make *partial reimbursement* for the cost of its employees' safety shoes. At the Union's request, that amount has increased (Emp. Exh. 3, p. 4; Tr. James 89-90). In 1976, 1977, 1979 and 1982, the Union

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[1]References to exhibits introduced into the record below will be as follows: Simpson's Exhibits will be "Emp. Exh. _____"; the Division's Exhibits will be "Div. Exh. _____"; and Joint Exhibits will be "Jt. Exh. _____." Simpson transcribed the tapes of the hearing and provided the Division a copy before briefs were filed with the hearing officer of the Division. A copy of those portions of the transcript relied upon by Petitioner are attached to the petition for writ of mandate filed with the Court of Appeal as Appendix "E." References to that transcript are "Tr. [witness' name] [page number typed at the bottom of the referenced page]." The parties relied on the transcript before the hearing officer of the Division without objection.

"Decl. of Dean Childers _____" refers to the Declaration of Dean Childers filed with the Court of Appeal in support of the Employer's petition for rehearing.

demanded and received substantial wage increases during collective bargaining negotiations, but the Union did not request an increase with respect to safety shoe reimbursement (Tr. James 102-04; Tr. Childers 72-74; Jt. Exhs. C, D, E, F, Decl. of Dean Childers, pp. 2-3). In 1985, the Union, not Simpson, proposed a change in the safety shoe allowance. Simpson refused the Union's proposal that it pay a $150.00 safety shoe allowance. The Union later accepted Simpson's counterproposal by which Simpson, as part of the overall economic package, agreed to increase its share of the cost of a pair of safety shoes in an amount *less than* that proposed by the Union (Decl. of Dean Childers, p. 4). The 1982 and 1985 negotiations occurred *after* Cal-OSHA issued its so-called Order to Take Special Action.

The Order to Take Special Action

In September 1980, Cal-OSHA issued and served its Order to Take Special Action (App. A, A-1 to Petition).[2] The order was amended, and it was appealed by Simpson, which appeal resulted in tape recorded administrative hearings held before a hearing officer. In November 1981, the hearing officer signed her proposed decision and forwarded it to the Chief of the Division. Chief Carter reviewed the proposed decision and, after making minor changes, published and served it on January 14, 1982 (App. B to Petition). The federal question sought to be reviewed was first raised before the hearing officer through Petitioner's appeal of the Order to Take Special Action. The hearing officer concluded that the issue of who was to pay for safety shoes had not been the subject

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[2]"App. ____ to Petition" refers to the appendices to the petition for writ of mandate originally filed with the Court of Appeal.

of contract negotiations and further found that the Arbitrator's decision was not controlling (App. B to Petition).

On February 11, 1982, Petitioner filed its petition for writ of mandate with the Court of Appeal, challenging that part of the decision which held that Simpson was required to pay the entire cost of a pair of safety shoes. The issue of federal preemption was raised in the petition for writ of mandate filed originally with the Court of Appeal. The three-judge panel, with a blistering dissent, held that the state's order was not preempted by federal law.

In dissent, Judge Puglia agreed with the Employer that the Division's order may not issue in contravention of the terms of an existing collective bargaining agreement between the Employer and the Union (p. A-13, *infra*). Judge Puglia noted that the majority conceded that (1) who is to pay for required safety shoes is a negotiable item; and (2) immediately preceding the order challenged by the petition for writ of mandate, there existed a collective bargaining agreement between Simpson and the Union requiring Simpson to pay only $4.00 toward the price of the safety shoes (p. A-14, *infra*). Judge Puglia reasoned as follows (pp. A-18-A-19, *infra*):

> [I]f the state law *oversteps its purpose* of assuring worker safety and health (See Lab. Code, § 6300) so as to effect an unjustifiable interference with economic subjects traditionally left to the bargaining process, the policies favoring collective bargaining and industrial self-government which underlie federal labor relations law (see Barrentine v. Arkansas-Best Freight System (1981) 450 U.S. 728, 735 [67 L.Ed.2d 641, 650]) may well prevail over and render the state statute unconstitutional. (Cf. Terminal R. Assn. v. Brotherhood of R. Trainmen (1943) 318 U.S.

1, 7-8 [87 L.Ed. 571, 578]; Industrial Welfare Com. v. Superior Court (1980) 27 Cal.3d 690, 728, particularly fn. 16; Hentzel v. Singer Co. (1982) 138 Cal.App.3d 290, 296-297, fn. 4.) Even where a competing claim in a second forum is based on a *federal* statute, deference is given to an arbitrator's labor relations decision which resolves rights arising out of the collective bargaining process unless the federal statute in question guarantees employees a minimum right which cannot be waived or abridged by contract. (See Barrentine v. Arkansas-Best Freight System, supra, 450 U.S. at pp. 736, 745 [67 L.Ed.2d at pp. 650, 656-657]; see also Alexander v. Gardner-Denver Company (1974) 415 U.S. 36 [39 L.Ed.2d 147]; McDonald v. West Branch (1984) ____ U.S. ____ [80 L.Ed.2d 302].) Common sense would seem to dictate that where, as here, the necessity of wearing foot protection is not in question, *the economic issue of who shall pay for such clothing is a matter so close to the heart of free labor market arrangements that it should be of no concern to the Division* so long as a binding agreement between labor and management has been reached. [Emphasis supplied in part; footnote omitted.]

Petitioner's federal question was again raised in its petition for rehearing filed with the Court of Appeal on July 7, 1986. The petition for rehearing was denied summarily on July 18, 1986 (p. B-1, *infra*). The federal issue was also raised in Petitioner's petition for review filed with the California Supreme Court on July 28, 1986. The petition for review was denied summarily on August 28, 1986 (p. C-1, *infra*).

The Arbitration

At about the same time that the above-described proceedings were initiated, the parties also litigated a grievance filed by the Union alleging that the Petitioner was obligated to pay the full cost of the safety shoes it required its employees to wear. The Petitioner rejected the Union's grievance and the matter was set for final and binding arbitration (Tr. James 95-97, 111-12; Tr. Childers 73; Emp. Exh. 1). A hearing was held before Arbitrator Sam Kagel who decided that Simpson was correct in its position. On September 14, 1981, Arbitrator Kagel concluded that Simpson and the Union were contractually bound by their collective bargaining agreement to the arrangement by which Simpson had to pay only a small amount of the cost of a pair of safety shoes (Emp. Exh. 3, pp. 5, 6).

REASONS FOR GRANTING THE WRIT

I

The Court Of Appeal's Decision Is In Clear Conflict With Federal Labor Law And Policy And With Decisions Of This Court Holding That State Action Which Interferes With Collective Bargaining Is Preempted By Federal Law.

This case presents a clear cut issue of far-reaching precedential value. The Division's Order to Take Special Action directly conflicts with a specific economic provision of Simpson's collective bargaining agreement. The federal labor law scheme does not tolerate such interference.

The issue in this case is purely economic. It is a question of who will pay for certain shoes; there is no dispute that the shoes should be worn. It is eminently

obvious that the answer to the question of who shall come forward with the money to purchase safety shoes is one that is economic. Paying for the shoes is a readily ascertainable cost item, easily expressed in dollars.[3]

Federal law requires that Simpson and the Union bargain regarding the wages, hours and working conditions of Simpson's employees (*see* section 8(d) of the LMRA, 29 U.S.C. § 158(d) (1974)). These are mandatory subjects of bargaining and Congress intended that Simpson and the Union resolve their differences regarding them without outside interference. *Teamsters Local 24 v. Oliver,* 358 U.S. 283 (1959); *NLRB v. Wooster Division of the Borg-Warner Corp.,* 356 U.S. 342 (1958). The majority of the Court of Appeal conceded that it is clear that the issue of who is to pay for safety equipment is a mandatory subject of collective bargaining (p. A-10, *infra*); *Southeastern Michigan Gas Co.,* 198 N.L.R.B. 1221 (1972), *enforced,* 485 F.2d 1239 (6th Cir. 1973); *Webster Outdoor Advertising Co.,* 170 N.L.R.B. 1395 (1968), *enforcement denied on other grounds,* 419 F.2d 726 (2d Cir. 1969).

Moreover, there is no doubt that the parties reached an agreement on this mandatory issue. From 1972 until the present, pursuant to the collective bargaining agreements, Simpson has paid an amount toward the purchase price of a pair of safety shoes, but *never* the full amount.

Manifestly, the lower court's ruling prevents and precludes the contracting parties from carrying out their own agreement upon a subject on which federal law demands bargaining. Such a result clearly frustrates the

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[3]Indeed, one of the Division's own witnesses, Ken Brown, admitted that the issue is not safety, as a pair of safety shoes is not made more safe by the fact that Simpson pays for them (Tr. Brown 38-39).

parties' solution of their problem.[4] Federal law does not and should not permit such a result.

At the core of the LMRA is section 7, which specifically gives employees the right to organize collectively, to designate representatives of their own choosing and to negotiate terms and conditions of their employment. 29 U.S.C. § 157 (1947). The chief doctrine of federal labor law preemption is that the parties meet on an even basis, free from state interference.

> [S]tate attempts to influence the substantive terms of collective-bargaining agreements are as inconsistent with the federal regulatory scheme as are such attempts by the NLRB . . .

Lodge 76, Machinists v. Wisconsin Employment Relations Comm'n, et al., 427 U.S. 132, 153 (1976).

> A local government, as well as the Labor Board, lacks the authority to ' "introduce some standard of properly 'balanced' bargaining power" . . . or to define "what economic sanctions might be permitted negotiating parties in an 'ideal' or 'balanced' state of collective bargaining" ' . . . The settlement condition imposed by [the local government] . . . destroyed the balance of power designed by Congress . . .

Golden State Transit Corporation v. City of Los Angeles, 475 U.S. ____, 106 S.Ct. 1395, 54 U.S.L.W. 4329, 4332 (1986) (citations omitted).

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[4]In fact, the Division's own hearing officer conceded by her silence that requiring Simpson to pay the entire cost of the safety shoes would take from the Employer and give to the Union that which the latter refused even to try to obtain prior to 1979 and was flatly refused by Simpson in 1979 and again in 1985.

The Court of Appeal's decision awarding the Union what it failed to obtain at the negotiating table directly conflicts with this Court's ruling in *Teamsters Local 24 v. Oliver,* 358 U.S. 283. There, a provision of a collective bargaining agreement set minimum rentals to be paid when a truck owner-operator leased his truck and services to a carrier. One such owner-operator, joined by several carriers, sued in state court to enjoin the enforcement of that provision. The state court granted the injunction on the ground that the challenged provision of the agreement violated the state's anti-trust law.

This Court reversed, noting first that the challenged contractual provision set wages in certain situations, a mandatory subject of bargaining under the LMRA. Application of the state's anti-trust law would prevent the parties from carrying out their agreement on the issues arrived at through the bargaining process. Congress had not affirmatively indicated that the states could limit the content of collective bargaining agreements with respect to their anti-trust implications. Accordingly, this Court unequivocally held the state law preempted. *Id.* at 295-96. The Court concluded that *any* limitation on the federal policy of encouraging collective bargaining must come from Congress and not a state. *Id.* at 296; *accord Allis-Chalmers Corp. v. Lueck,* 471 U.S. 202 (1985); *Alessi v. Raybestos-Manhattan, Inc.,* 451 U.S. 504, 525-26 (1981); *Teamsters Local 20 v. Morton,* 377 U.S. 252, 260 (1964).

In this case, it is the state which would aid the Union that lacked the economic power to force Simpson to grant the terms it sought. But *Oliver* and its progeny prohibit the state from substituting its power for the economic power available to a party to a collective bargaining relationship. As the Court declared in *Oliver*:

> [T]he conflict here is between the federally sanctioned agreement and state policy which seeks specifically to adjust relationships in the world of commerce. If there is to be this sort of limitation on the arrangements that unions and employers may make with regard to these subjects, pursuant to the collective bargaining provisions of the Wagner and Taft-Hartley Acts, it is for Congress, not the States, to provide it.

358 U.S. at 297. *A fortiori,* Cal-OSHA has absolutely *no basis* for attempting to substitute its position for the parties' bargained for position.

It cannot be emphasized enough that safety is not an issue in this case; rather, the issue is who must *pay* for safety shoes which employees wear and which all parties agree they should and must wear. The record is devoid of any claim that there is a disproportionate number of foot injuries at Simpson; that employees are not able to pay for the shoes; that employees are not purchasing the best and most expensive safety shoes money can buy; or that the Employer is guilty of over-reaching or bad faith. No claim[5] and certainly no showing was made even to suggest

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[5]Not until the case reached the California Supreme Court did Cal-OSHA even attempt to rationalize its position as being somehow related to safety. Its after the fact claim is that employees "*may hesitate,* for economic reasons, to replace such equipment . . ." (Answer to Petition for Review, p. 10, emphasis added). There is absolutely nothing in the record to support this speculative position vis-a-vis Simpson. Far to the contrary, as noted above, the record is devoid of any factual basis for the claim. In *American Textile Mfrs. Inst., Inc. v. Donovan,* 452 U.S. 490, 539 (1981), this Court rejected post hoc rationali even where, unlike this case, they had merit. Cal-OSHA's second justification is that the Employer is "in the best economic position to assume this financial responsibility and if necessary pass this cost onto consumers . . . " Again, there is abso-

that employee safety is at issue. Moreover, federal law clearly does *not* require the Employer to pay for safety equipment. *American Textile Mfrs. Inst., Inc. v. Donovan,* 452 U.S. at 538, 540; *Budd Company v. Occupational Safety and Health Review Comm'n,* 513 F.2d 201 (3d Cir. 1975).

Scores of collective bargaining agreements covering thousands of employees across the nation will be negotiated this year alone, just as Simpson reached a settlement here. Many of those agreements will provide which party pays for safety equipment or clothing or shoes and the amount of such payments. Those numerous employers, unions and employees involved need to know the potential effect of a state agency's orders when the parties meet to negotiate. They need to know whether their agreements on such a critical economic issue are final and binding. Plenary consideration of the matter by this Court is essential.

II

The Court Of Appeal's Decision Is Contrary To Federal Law Mandating That The Arbitrator's Decision Be Given Full Force And Effect.

Federal law favors the resolution of disputes between employers and unions by means of final and binding arbitration. Neither the courts nor any governmental agency may interfere with this important cog in the federal labor law scheme.

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lutely nothing in the record to substantiate such social tinkering, and no basis for concluding that Cal-OSHA has the expertise to engage in it. It was just such meddling with the marketplace that Congress sought to and did prevent by preempting interference with the substance of employer-union negotiations. *Teamsters Local 24 v. Oliver,* 358 U.S. 283.

On May 21, 1981, an arbitration was held before Arbitrator Sam Kagel, Esq. Thus, not only have the parties agreed that the matter is one of contractual interpretation, and that the matter should be heard by a labor arbitrator, but they arbitrated the case and have received the answer of the Arbitrator — the person whose decision *both parties* bargained for and agreed would be final and binding.

Ever since the *Steelworkers* trilogy,[6] one fundamental principle of labor law is that if a dispute is arbitrable, then only one person may resolve it — the parties' chosen arbitrator. In *United Steelworkers v. American Mfg. Co.*, 363 U.S. at 566, this Court held that the federal policy favoring arbitration could only be effectuated "if the means chosen by the parties for the settlement of their differences under a collective bargaining agreement is given full play."

It is obvious that the parties have agreed, both in their collective bargaining agreement and by their submission of the dispute to arbitration, that the matter of who will pay for safety shoes is a *contractual matter* that must be resolved by arbitration. Consequently, Cal-OSHA's order, which is contrary to the arbitrator's decision, must be dismissed. Federal labor policy requires that the arbitration be afforded its *preferred position* in the scheme of labor relations. Any interference with the arbitrator's decision can only be viewed as a direct interference with the federal labor scheme within which arbitration, at least

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[6]The *Steelworkers* trilogy refers to the landmark decisions of this Court on June 20, 1960, i.e., *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); and *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

since the *Steelworkers* trilogy, has undeniably been a cornerstone.

Neither *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974) nor *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728 (1981) applies to this case. First, both of those cases dealt with Congressional statutes setting forth federal rights and remedies in accordance with Congress' view that (1) the eradication of racial discrimination was of the "highest priority"; and (2) that it was necessary to have a uniform national policy regarding the minimum wage. This Court decided that Congress believed these federal rights were matters of sufficient importance so that they should be finally resolved in court. In this case, Congress has made no such determination. *Cf. Budd Company v. Occupational Safety and Health Review Comm'n*, 513 F.2d at 205-06.

Second, this case, unlike *Alexander* and *Barrentine*, raises no issue with regard to access to court. Discovery is virtually the same in both *fora*. In fact, procedurally, Cal-OSHA's hearing and the arbitration are virtually indistinguishable.

Third, there is no claim but that the Union in this case was four-square behind both the Cal-OSHA hearing and the arbitration. Cal-OSHA's main witnesses were the Union President and the Union Safety Steward. Both testified emphatically and demonstrated that the Cal-OSHA matter, particularly the issue of who shall pay for safety shoes was extemely important to them (*See, e.g.*, Tr. James 103).

Moreover, in contrast to Title VII, Cal-OSHA recognizes the aligned interest of unions and the employees they represent. The employer is required to give the union notice of a pending Cal-OSHA matter and the union is

entitled to appear as an entity at the hearing. Cal. Lab. Code §§ 6314(d), 6601, 6602; Cal. Admin. Code tit. 8, R. 356(a) (1985). There is no procedure for citing a union for a violation of Cal-OSHA as there is under Title VII, where unions in addition to employers can be held liable for an employee's racial discrimination. And, there is clearly no basis for concern that an employee will fail to receive undivided loyalty and support by the union at a related arbitration; clearly no such allegation was made in this case. *Cf. Alexander*, 415 U.S. at 58, n. 19 and *Barrentine*, 450 U.S. at 733.

Fourth, the issue in this case — who shall pay for safety shoes — is patently not "nonwaivable". Indeed, the California Supreme Court in *Bendix Forest Products Corp. v. Division of Occupational Safety and Health*, 25 Cal.3d 465, 472, n. 7 (1979), made it clear that under certain circumstances (for example, as in this case) there can be an agreement between an employer and union as to who specifically shall have to pay for safety shoes. On the other hand, in *Alexander v. Gardner-Denver*, one of the critical issues in the Court's reasoning was that a union could not waive the Title VII statutory right of an employee to be free from racial discrimination, and in *Barrentine*, of extreme import was the long line of this Court's decisions holding rights under the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* (1938), to be nonwaivable, individually or collectively. Clearly, if Congress has determined that a right is not waivable, even collectively, it follows that an arbitrator's decision precluding the right (e.g., to a federal court trial) will not be final and binding. No such consideration even remotely exists in this case. *Far to the contrary, as noted above, federal law is that employers do not have to pay for such items as safety shoes; no federal right existed to be waived.*

Budd Company v. Occupational Safety and Health Review Comm'n, 513 F.2d at 206-07.

Therefore, the Arbitrator's determination must be upheld as a matter of federal labor law.

III

The Court Of Appeal's Decision Ignores The Realities Of Collective Bargaining And Places An Impossible Burden On Employers And Unions.

As the declaration of Dean Childers demonstrates, the Employer and the Union negotiated for a new collective bargaining agreement in 1982 and 1985 (Decl. of Dean Childers, pp. 2-4). At both sets of negotiations, there were discussions regarding safety shoes. Both sets of negotiations occurred *after* the issuance of the Order to Take Special Action. During the 1982 and 1985 negotiations, Simpson and the Union agreed to divide the Union's proposals into two groups — noneconomic and economic items. The Union agreed that the safety shoe allowance was an economic item and would be discussed after the noneconomic items had been discussed. In 1982 no change was made in the amount to be paid by the Employer for safety shoes, but increases were made in other economic items such as wages and fringe benefits. In 1985, the Employer, as part of the overall economic package, agreed to increase its share of the cost of a pair of safety shoes. The Employer refused the Union's proposal that the Employer pay a $150 safety shoe allowance, and the Union later accepted the Employer's lower counterproposal, resulting in the final settlement of this issue.

From the foregoing, it is apparent that the parties continued to consider the safety shoe issue a negotiable economic item *even after* the Order to Take Special Action

issued. Moreover, the Union was willing to settle for less than full payment for a pair of safety shoes provided the Employer was willing to make other concessions in different economic areas, such as wages and other fringe benefits.

Under the reasoning of the Court of Appeal, however, an employer and union could never agree to split the cost of safety shoes unless there were an Order to Take Special Action and litigation with Cal-OSHA. Such a rule does not afford the parties the freedom to negotiate required by federal law. *Allis-Chalmers Corp. v. Lueck,* 471 U.S. 202; *Lodge 76, Machinists v. Wisconsin Employment Relations Comm'n, et al.,* 427 U.S. 132; *Teamsters Local 20 v. Morton,* 377 U.S. 252; *Teamsters Local 24 v. Oliver,* 358 U.S. 283.

The Court of Appeal correctly held that there "clearly existed a consistent past practice governing reimbursement for safety shoes which became as much a part of the contract as if expressly stated" (p. A-10, *infra*). The Court nevertheless considered as key the fact that this express agreement occurred before the issuance of the Order to Take Special Action. Under this reasoning, there could never be a binding agreement between the parties to pay for safety shoes absent litigation with Cal-OSHA. This is so because, except in rare instances (as the Declaration of Mr. Childers demonstrates occurred in this case), there will not be an Order to Take Special Action when the parties negotiate this critical economic item.

The policy considerations underpinning preemption are too strong to permit such a result. An agreement between an employer and union on an economic item such as who pays for safety shoes cannot depend for its efficacy on when or whether Cal-OSHA issues an Order to Take

Special Action. Therefore, the Court should hold that Cal-OSHA's order was preempted. *Allis-Chalmers Corp. v. Lueck,* 471 U.S. 202; *Lodge 76, Machinists v. Wisconsin Employment Relations Comm'n, et al.*, 427 U.S. 132; *Teamsters Local 20 v. Morton,* 377 U.S. 252; *Teamsters Local 24 v. Oliver*, 358 U.S. 283.

IV

The Court Of Appeal's Decision Is Contrary To Federal OSHA Law.

In *Budd Company v. Occupational Safety and Health Review Comm'n,* 513 F.2d 201, the court stated the *federal rule* that the issue of who was to bear the cost of required protective footwear was negotiable. The court held as follows:

> Unlike other labor statutes with essentially economic purposes, the Act [Fed/OSHA] is concerned solely with safety and health in the work situation. Prescription of cost allocations is not essential to the effectuation of the Act's objectives. . . . *The question of cost allocation, on the other hand, is a question to be resolved between employer and employee.* In our judgment, it is an appropriate subject for collective bargaining.

513 F.2d at 203 (footnotes omitted; emphasis added).

The court further noted that neither the Act nor the regulation explicitly required that the employer finance the implementation of the safety measure in question (*id.* at 206); and since the protective footwear was required regardless of cost allocation, the decision of the Commission in no way diminished "the employer's obligation to ensure that safety shoes are in fact worn when required." *Id.* (footnote omitted); *see also American Textile Mfrs.*

Inst., Inc. v. Donovan, 452 U.S. at 540 (where this Court stated that the federal Occupational Safety and Health Act "in no way authorizes OSHA to repair general unfairness to employees that is unrelated to achievement of health and safety goals. . . .").

Cal-OSHA may not usurp or negate Simpson's federal right to bargain regarding an economic item — a mandatory subject of bargaining under the LMRA. Federal law does not permit it; indeed, federal OSHA is directly contrary to the Court of Appeal's holding.

CONCLUSION

For the reasons set forth herein, the petition for a writ of certiorari should be granted. The finely balanced federal labor scheme established by Congress depends for its success on the parties' freedom to negotiate without interference at their table from local, state or federal governments. In this case, Cal-OSHA has violated that cornerstone precept to the detriment of Simpson *and all* employers and unions subject to the federal law.

Respectfully submitted,

LITTLER, MENDELSON, FASTIFF & TICHY
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Simpson Paper Company

APPENDIX A

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THE THIRD APPELLATE DISTRICT

3 CIV. 21516
SIMPSON PAPER COMPANY,
Petitioner,
v.
DIVISION OF OCCUPATIONAL SAFETY AND HEALTH OF THE DEPARTMENT OF INDUSTRIAL RELATIONS FOR THE STATE OF CALIFORNIA,
Respondent.

Filed June 23, 1986.

We review a decision of the Division of Occupational Safety and Health of the Department of Industrial Relations (Division) which upheld an order directing petitioner Simpson Paper Company (Simpson) to provide and pay for protective safety shoes for certain of its employees.

We issued an alternative writ of mandate and a stay pending our review of the validity of the Division's order. Simpson, seeking a peremptory writ, contends: (1) the Division, by issuing the order, exceeded its statutory jurisdiction and enforcement powers, violated the supremacy clause of the United States Constitution and denied it due process of law; and (2) its collective bargaining agreement covers the subject of payment for safety shoes, thus preempting and precluding the Division's order as a matter of federal labor law. We conclude that the Division had authority to issue the challenged

order and that the order is valid. We shall therefore deny the petition.

FACTS

Simpson is a manufacturer of high-grade paper at its Shasta Mill. It is also an employer engaged in and affecting commerce within the meaning of the National Labor Relations Act. (29 U.S.C. § 151 et seq.) The Division conducted an inspection of the Shasta Mill, after which it issued the order which is the subject of this dispute. The order was issued on September 19, 1980.

Simpson took over the operation of the Shasta Mill in 1972 from Kimberly-Clark. At that time Kimberly-Clark had a collective bargaining agreement with United Paperworkers International Union, Local No. 1101, AFL-CIO (Union). Simpson continued the bargaining relationship with the Union and signed collective bargaining agreements in 1974, 1976, 1977, and 1979. Each agreement contained identical provisions related to safety.[1] None of the agreements ever contained a requirement that Simpson pay for safety shoes or any other safety equipment. The issue was never formally discussed as a part of contract negotiations.

When Simpson purchased the mill it continued Kimberly-Clark's practice of reimbursing employees in

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[1]Those provisions read: "20.01 Supervisors are to confine their instructions and procedures within the generally accepted standards of safe practices. [¶] 20.02 Employees are to comply with all safety rules established, published, and made available to the employee by the Company from time to time. [¶] 20.03 The Local Union shall appoint two representatives to serve as members of the Company's Safety Steering Committee, which meets at least once a month to consider various safety problems and safety rules."

the amount of $2 per pair of safety shoes. At the Union's request, Simpson later agreed to raise that figure to $4 per pair.[2] That was the only request the Union made for an increase since Simpson assumed operation of the mill, although the Union negotiated for and received substantial wage increases.

Since 1973 Simpson has been subject to the California Occupational Safety and Health Act (Lab. Code. § 6300 et seq.)[3] requiring it to furnish safety devices and safeguards to ensure safe and healthful employment. (§ 6401.) Since 1974 an implementing regulation has been in effect requiring foot protection under generally defined circumstances. (Cal. Admin. Code, tit. 8, § 3385.)[4]

In 1979, during contract negotiations (although the matter was not on the parties' agenda), Simpson and the Union discussed a Union grievance claiming Simpson was required to pay for the safety shoes. Simpson rejected the Union's claims, denied the grievance, and refused to pay for the shoes. At these negotiations maintenance employees received an increase in their tool allowance and Simpson granted the Union's request for a wage increase.

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[2]The total cost for a pair of safety shoes is between $50 and $60.

[3]All further references, unless otherwise indicated, are to the Labor Code.

[4]The text of that regulation is as follows: "(a) Appropriate foot protection shall be required for employees who are exposed to foot injuries from hot, corrosive, poisonous substances, falling objects, crushing or penetrating actions, which may cause injuries or who are required to work in abnormally wet locations. [¶] (b) Footwear which is defective or inappropriate to the extent that its ordinary use creates the possibility of foot injuries shall not be worn. [¶] (c) Safety-toe footwear for employees shall meet the requirements and specifications in American National Standard for Men's Safety-Toe Footwear, Z41.1-1967."

The Union's grievance went to arbitration, resulting in a decision by arbitrator Sam Kagel on September 14, 1981, in favor of Simpson. Mr. Kagel stated:

"The record indicates that in 1974 and 1976, on a wage reopener in 1977 and in June of 1979, the Parties had collective bargaining sessions relative to the Collective Bargaining Agreement between the Company and the Union. The evidence is clear that in none of those negotiations did the Union seek to provide for full payment for safety shoes. The past practice relative to some payment for safety shoes is of such duration that it has in effect become part of the Agreement between the Parties and this is specifically so in that the Company increased the amount of reimbursement as a result of the direct request of the Union. . . .

"The record is clear therefore that the Union was aware of the subject matter involved in this arbitration; that in effect it had negotiated by way of a practice what amounts to an addition to section XX of the Agreement, at least insofar as safety shoes are concerned."

"[I]t is clear that expense for certain items whether they be for safety purposes or otherwise is a mandatory subject of bargaining, that in this case it was in effect bargained by the Parties by them recognizing and at the instigation of the Union changing to the advantage of the Union a practice relative to reimbursement of safety shoes; accordingly this was recognized by the Parties as a subject of collective bargaining . . . "

The arbitrator concluded that the agreement between the parties relieved Simpson of any statutory duty to pay the entire cost of the shoes.

On September 19, 1980, the Division issued its order to take special action which specifically mandated the use of

designated safety shoes for various enumerated employees. It also directed Simpson to pay for such equipment.[5]

A Division hearing officer upheld the Division's order requiring Simpson to pay for the safety shoes. The officer found no explicit reference in the collective bargaining agreement to payment for safety shoes, and concluded that the issue was not the subject of contract negotiations. The officer made the following legal conclusions: (1) there was no agreement in the parties' contract on the

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[5]The special order, in relevant part, provides: "Foot protection is required for employees in the following activities or areas: [¶] (a) Calendar Progression [¶] (b) Winder Progression [¶] (c) Coating Plant [¶] (d) Cutter Progression [¶] (e) Trimmer Progression [¶] (f) Sheet Packaging Progression [¶] (g) Maintenance [¶] (h) Sorters [¶] (i) Repulper [¶] (j) Materials Handling Laborer [¶] (k) Small Store Employees

"The employees involved in the above activities are exposed to foot injuries while handling paper rolls, shafts, gears, platforms, redi-powers and outriggers non-rider power lifts, calendar rolls and other tools and materials capable of falling and rolling or crushing injuries to employees' toes.

"External toe protection worn over employee shoes or boots is inappropriate and shall not be worn by employees while performing activities which entail: [¶] (1) Walking on uneven surfaces. [¶] (2) Climbing of ladders or stairs. [¶] (3) The operation of Redi-power on outrigger non-rider powered lifts. [¶] (4) The operation of roll lifts, fork lifts, or other rider powered lifts.

"This specifically includes maintenance employees, calendar employees, cutters and second cutters, and rider and non-rider power lift employees. The Division finds that toe caps for these employees dramatically increases the likelihood of tripping, falling or slipping in their performance of the above tasks.

"Therefore, the employer shall pay for and provide to these employees, acceptable foot protection in the form of steel toed safety boots or shoes, meeting the American National Standard for Men's Safety-Toe Footwear, Z 41.1-1967"

issue of payment for safety shoes; (2) the Division is not preempted from enforcing its order by reason of the arbitration proceeding and order; and (3) the Division has the authority to issue its order, and the order does not violate Simpson's rights. Simpson then filed its original petition for mandate in this court.[6]

I

We examine first the authority of the Division to issue the challenged order. By statute, the primary responsibility for safety is placed on the employer. Section 6400 provides that "Every employer shall furnish employment and a place of employment which are safe and healthful for the employees therein." The employer is required to

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[6]Section 6308 provides that, "All orders, rules, regulations, findings, and decisions of the division made or entered under this part may be reviewed by the Supreme Court and the courts of appeal as may be provided by law." The California Constitution provides in article VI, section 10 that Courts of Appeal have ". . . original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition." According to rules of statutory construction, since superior court review is omitted from section 6308, while included in other portions of the California Occupational Safety and Health Act, an "implied negative" grant of power excludes superior court review. (Wildlife Alive v. Chickering (1976) 18 Cal.3d 190, 196.)

We note the validity of the Division's safety orders was recently attacked directly by writ of mandamus in the Court of Appeal without question by our Supreme Court. (Bendix Forest Products Corp. v. Division of Occupational Saf. & Health (1979) 25 Cal.3d 465, 467, 469.)

Therefore, we agree with the parties that this court's jurisdiction is exclusive of the superior court's. (See San Francisco Bay Area Rapid Transit Dist. v. Division of Occupational Saf. & Health (1980) 111 Cal.App.3d 362, 364.)

". . . furnish and use safety devices and safeguards, and shall adopt and use practices . . . which are reasonably adequate to render such employment and place of employment safe and healthful. . . ." (§ 6401.)

The Division is the agency charged with enforcing and administering "all laws and lawful standards and orders, or special orders" requiring a safe working environment and protection of employee health. (§ 6307.)[7]

Section 6305 defines "occupational safety and health standards and orders" as follows: "(a) 'Occupational safety and health standards and orders' means standards and orders adopted by the standards board pursuant to Chapter 6 (commencing with Section 140) of Division 1 and general orders heretofore adopted by the Industrial Safety Board or the Industrial Accident Commission." "Special orders" are defined as orders ". . . written by the chief or the chief's authorized representative to correct an unsafe condition, device, or place of employment which poses a threat to the health or safety of an employee and which cannot be made safe under existing standards or orders of the standards board. . . ." (§ 6305, subd. (b).)

Simpson challenges both the authority for the Division's action and the legality of its hearing procedures. It does not, however, contest the Division's factual determinations that safety shoes, rather than toe caps, must be worn in certain job categories and that safety shoes are required in certain departments. Its claims are meritless.

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[7]Section 6307 provides: "The division has the power, jurisdiction, and supervision over every employment and place of employment in this state, which is necessary to adequately enforce and administer all laws and lawful standards and orders, or special orders requiring such employment and place of employment to be safe, and requiring the protection of the life, safety, and health of every employee in such employment or place of employment."

The responsibility of the Division to provide for the safety of workers is not limited by the statutory provision in section 6305 for issuance of special orders to correct unsafe conditions. The Division's powers and duties extend to administering and enforcing " 'all laws and lawful standards and orders or special orders . . . .' " (§ 6307; *Bendix,* 25 Cal.3d at p. 470.) Section 6308 contains broad enforcement authority.[8] The Division's power under this section and other statutory provisions " 'make clear that the terms of the legislation are to be given a liberal interpretation for the purpose of achieving a safe working environment. [Citation.]' " (*Ibid.*)

Ample authority supports the Division's action. Although no general law refers to foot protection, the Standards Board, pursuant to authority set forth in section 142.3, has adopted a regulation or standard which provides that foot protection may be required. (Cal. Admin. Code, tit. 8, § 3385, subd. (a).) It was pursuant to sections 6308 and the foregoing regulation that the Divi-

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[8]In pertinent part, section 6308 provides: "The division, in enforcing occupational safety and health standards and orders and special orders may do any of the following: (a) Declare and prescribe what safety devices, safeguards, or other means or methods of protection are well adapted to render the employees of every employment and place of employment safe as required by law or lawful order. [¶] (b) Enforce Section 25910 of the Health and Safety Code and standards and orders adopted by the standards board pursuant to Chapter 6 (commencing with Section 140) of Division 1 of the Labor Code, for the installation, use, maintenance, and operation of reasonable uniform safety devices, safeguards, and other means or methods of protection, which are necessary to carry out all laws and lawful standards or special orders relative to the protection of the life and safety of employees in employments and places of employment. [¶] (c) Require the performance of any other act which the protection of the life and safety of the employees in employments and places of employment reasonably demands."

sion issued its "Order to Take Special Action" directing Simpson to provide safety shoes at company expense. This action is virtually identical to that upheld in *Bendix*.[9] (See *Bendix*, 25 Cal.3d at pp. 470-471.)

Simpson also asserts the Division's hearing officer is subject to a conflict of interest because her superior was counsel for the Division in *Bendix*. This claim is unmeritorious. Simpson neither cites authority for its proposition nor demonstrates how the fact the hearing officer's superior was counsel for the Division in *Bendix* demonstrates a conflict of interest or bias.

II

We next examine the validity of the order. Simpson's primary contention is that the Division has entered into a dispute that arose as a grievance, attempting to alter the bargaining relationship between management and labor on an issue that is not a matter of safety, but of cost, i.e., who shall pay for safety shoes. Such an intrusion into the bargaining process, Simpson reasons, where the parties' agreement requires only that Simpson pay $4 for a pair of safety shoes, is contrary to federal labor law.

Our Supreme Court addressed a similar issue in Bendix Forest Products Corp. v. Division of Occupational Saf. & Health, supra, 25 Cal.3d 465. There, a lumber industry employer sought review of a decision by the Division ordering the employer to provide protective gloves or mittens to its employees at company expense. The custom in the industry was for the employees to pay

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[9]Simpson attempts to distinguish *Bendix* on the ground that safety gloves and safety shoes are different. But Simpson fails to demonstrate *how* these differences should change the analysis or compel a different result.

for protective devices. Bendix required its employees to wear gloves or mittens, and provided them on a cash or payroll deduction basis. (*Id.*, at pp. 467, 470, 471.)

The Supreme Court unanimously held the Division had the authority to enforce the laws and standards regarding protective hand coverings at the Bendix plant, had correctly interpreted the law and standards to require Bendix to bear the expense, and had properly enforced the applicable safety regulation. (*Id.*, at p. 473.)

In a footnote, the court noted the record contained no evidence of an agreement in the contract between management and labor regarding payment for protective clothing. It therefore declined to express an opinion on the issue " . . . whether . . . the payment of required safety equipment and clothing can be a proper subject of collective bargaining." (*Id.*, at p. 472, fn. 7.)

Simpson claims that because the parties here made an agreement on the subject of payment for safety shoes, the issue left undecided in *Bendix* is squarely presented.

While we disagree with the Division's posture that no contract existed covering reimbursement for the cost of safety shoes, we determine that the rule in *Bendix* nonetheless governs this case.

As the arbitrator held in the grievance arbitration, there clearly existed a consistent past practice governing reimbursement for safety shoes which became as much a part of the contract as if expressly stated. (United Steelworkers v. Warrior and G. Nav. Co. (1960) 363 U.S. 574 [4 L.Ed.2d 1409].) It is equally clear that the issue of who is to pay for safety equipment is a mandatory subject of collective bargaining. (29 U.S.C. § 158(d); Southeastern Michigan Gas Company, 198 NLRB 1221 (1972);

Webster Outdoor Advertising Co., 170 NLRB 1395 (1968).)

It is uncontroverted, however, that all contract negotiations relating to the reimbursement occurred *before* the issuance of the order to take special action. Prior to its issuance, there existed no specific mandatory duty on the part of the employer to provide particularly described equipment for the enumerated employees. That duty arose only upon issuance of the order here complained of.

Where, as here, there was no mutually recognized obligation of the employer to pay for the safety shoes for the enumerated employees before the order, it is untenable to urge that the employees bargained away that to which they had a statutory entitlement.[10]

Hence, as in *Bendix,* we find no agreement applicable to the period after issuance of the order on September 19, 1980. Therefore, we too do not reach the question of whether the payment for required safety equipment can be shifted to the employee by collective bargaining.

Simpson's contention that the Division's interference with the collective bargaining process is absolutely preempted by federal labor law is also untenable. It is settled that state regulation of the health, safety and welfare of workers is not preempted by federal labor law. (Terminal R. Asso. v. Brotherhood of R. Trainmen (1943) 318 U.S. 1, 6-7 [87 L.Ed. 571, 577-578].) In Industrial Welfare Com. v. Superior Court (1980) 27 Cal.3d 690, 727-728, the court sanctioned regulation of employee welfare as well as the health and safety of workers, even though the

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[10]The words "provide" and "furnish" in sections 6403 and 6401 have long since been interpreted to mean that the employer has a duty to pay for obligatory safety equipment. (Oakland Police Officers Association v. City of Oakland (1973) 30 Cal.App.3d 96.)

matters affected may constitute mandatory subjects of collective bargaining. Safety measures are a matter within the province of permissible state regulation, even though they may also be a mandatory subject of collective bargaining.

Simpson's claim that the Division must defer to the arbitrator's decision is equally unavailing. Deference to an arbitral decision is appropriate where the claim is based on rights arising out of the collective bargaining agreement. On the other hand, "... different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers." (Barrentine v. Arkansas-Best Freight System (1981) 450 U.S. 728, 737 [67 L.Ed.2d 641, 651].)

The arbitrator is limited to interpretation of the collective bargaining agreement. (United Steelworkers v. Enterprise Corp. (1960) 363 U.S. 593, 597 [4 L.Ed.2d 1424, 1428].) His interpretation of the parties' contract here (that Simpson had no contractual duty to pay for the shoes) is not inconsistent with the hearing officer's findings. Moreover, where, as here, there is an independent statutory basis for the protection of workers, the arbitrator's decision cannot control matters outside of the collective bargaining agreement.

We conclude that the order does not violate federal labor law and that it is consequently valid and enforceable.

The alternative writ is discharged, the stay dissolved and the petition for writ of mandate denied.

FORD, J.*

I concur:

SPARKS, J.

I respectfully dissent. I agree that the Division of Occupational Safety and Health (Division) has general statutory authority to issue an order directing an industrial employer to pay the cost of safety shoes which must be worn by its employees. But I do not subscribe to the majority's conclusion that such an order may issue in contravention of the terms of an existing collective bargaining agreement between the employer and the employee union.

I disagree with the majority that the decision in Bendix Forest Products Corp. v. Division of Occupational Saf. & Health (1979) 25 Cal.3d 465 governs the outcome of this case. *Bendix* interpreted an employer's obligation to "furnish" safety devices for its employees under Labor Code section 6401 to mean that the employer bears the primary responsibility of paying for required personal protective equipment. However, the record in *Bendix* contained no evidence of a collective bargaining agreement between the employer and the employee union, and the Court expressly left open the question whether the payment for required safety equipment and clothing could be a proper subject of collective bargaining. (*Id.*, at p. 472, fn. 7.) By its own terms, *Bendix* stands only for the principle that, in the absence of a collective bargaining agreement allocating such economic responsibilities, the Division has enforcement authority under section 6401 to issue an

*Assigned by the Chief Justice.

order directing an employer to bear the full expense of safety shoes.

Federal decisions which have considered the issue uniformly recognize that matters touching on worker safety are a proper if not mandatory subject of collective bargaining. (29 U.S.C. § 151 et seq.) (N.L.R.B. v. Gulf Power Company (5th Cir. 1967) 384 F.2d 822, 824-825; Atlantic & Gulf Stevedores v. Occupational Safety (3d Cir. 1976) 534 F.2d 541, 555; Gateway Coal Co. v. Mine Workers (1974) 414 U.S. 368, 379-380 [38 L.Ed.2d 583, 593]; Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608, 620, 623; Solano County Employees' Assn. v. County of Solano (1982) 136 Cal.App.3d 256, 260-262.)[1] Indeed, the majority so much as concedes that who is to pay for required safety shoes is a negotiable item. Furthermore, the majority concedes that, immediately preceding the order challenged by this petition, there existed a collective agreement between Simpson and the employee union requiring Simpson to pay only $4 toward the price of the safety shoes.

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[1]The federal labor relations law defines mandatory subjects of bargaining as those issues "with respect to wages, hours, and other terms and conditions of employment, . . ." (29 U.S.C.A. § 158(d); McDonald v. Hamilton Elec., Inc. of Florida (11th Cir. 1982) 666 F.2d 509, 513.) As construed by the courts, mandatory subjects are limited generally to " 'issues that settle an aspect of the relationship between the employer and the employees' and that have more than a speculative and insubstantial impact upon that relationship." (*McDonald*, at pp. 513-514.) While the parties are free to bargain on subjects which have only a minimal or indirect effect on the terms and conditions of employment (see Champion Parts Rebuilders, Inc. v. N.L.R.B. (3d Cir. 1983) 717 F.2d 845, 854-855), these permissive matters "may not be made prerequisites to agreements on mandatory items." (N.L.R.B. v. Intern. Union of Op. Engineers, etc. (3d Cir. 1976) 532 F.2d 902, 907.)

Thus a controversy is presented as to whether a collective bargaining agreement which shifts the employer's responsibility for financing personal protective equipment to the employee is antagonistic to the mandate of Labor Code section 6401. Yet the majority avoids the controversy through the device of a dubious distinction between contract negotiations relating to reimbursement which here occurred before issuance of the Division order directing full employer payment and those which might be entered after the issuance of such an order. The majority apparently reasons that Simpson had no statutory duty to pay for the safety shoes prior to the order in question and hence the employees could not have bargained away that to which they did not know they were entitled. The fallacy inherent in this logic is that the Division's order would not in the first instance have been justified as a "specific application of laws and existing regulations" (see *Bendix,* supra, 25 Cal.3d at p. 471) if the Legislature never intended that the employer's responsibility for financing personal safety clothing would prevail over the terms of a collective agreement between management and labor.

When the substantive issue is confronted on its merits, I believe that *Bendix* lends support to rather than detracts from a collective bargaining exception relative to the economic issue here tendered. For, in construing section 6401, the *Bendix* court relied heavily upon a prior Attorney General opinion which stated: "[T]he originally ambiguous word 'furnish' in section 6401 has been interpreted by the Division . . . to mean that the employer must *at his expense* supply personal protective equipment, unless he and his employees — singly or collectively — agree otherwise. This construction, which has long stood unchallenged, is reasonable and within agency authority." (51 Ops. Cal.Atty.Gen. 105, 109 (1968), quoted in *Bendix,* supra, 25 Cal.3d at p. 472; emphasis in

original.) The Attorney General opinion went on to say that, while the primary responsibility for industrial safety rests with the employer, employees may prefer to use their own safety devices which are "highly personal" in nature, "perhaps in return for other concessions from the employer." (51 Ops. Cal.Atty.Gen. at p. 109.) "Where these alternative arrangements are incorporated in the collective bargaining agreement, it would seem absurd to hold that they violate the literal meaning of Section 6401 that 'the *employer* shall furnish.' " (*Ibid.*; emphasis in original.)

Consonant with the views expressed in *Bendix,* I adhere to the reasonableness of the Division's long-standing interpretation. Not only is such an interpretation by the administrative agency charged with enforcing the statute entitled to great weight (see *Bendix,* supra, 25 Cal.3d at p. 472; Carmona v. Division of Industrial Safety (1975) 13 Cal.3d 303, 310), but there is no clear indication that the Division has now altered its position. In this petition the Division's only apparent quarrel is with labor arbitrator Kagel's conclusion that the applicable labor-management agreement did in fact embrace reimbursement for safety shoes. And the pertinent administrative regulation in existence since 1974 does not even speak in terms of "furnish"; it specifies only that appropriate foot protection "shall be required" for employees exposed to certain types of foot injuries. (Cal. Admin. Code, tit. 8, § 3385, subd. (a).)[2]

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[2]Another regulation actually contemplates the situation where employees will own their personal protective equipment. It provides in pertinent part that: "The employer shall assure that employee-owned personal protective equipment complies with standards and regulations prescribed by the Division . . . ." (Cal. Admin. Code, tit., 8, § 3380, subd. (d).)

Moreover, a statutory construction which does not usurp traditional subjects of collective bargaining is consistent with the interpretation given a parallel regulation under the federal Occupational Safety and Health Act. In Budd Co. v. Occupational Safety & Health Rev. Com'n (3d Cir. 1975) 513 F.2d 201, the Third Circuit Court of Appeals upheld the commission's ruling that 29 C.F.R. § 1910.132(a)[3] did not mean that the issue of who was to bear the cost of required protective footwear was nonnegotiable. Instead, the court embraced (*Budd,* at p. 206) the following rationale offered by the commission in support of its ruling: " 'Unlike other labor statutes with essentially economic purposes, the Act [Fed/OSHA] is concerned solely with safety and health in the work situation. Prescription of cost allocations is not essential to the effectuation of the Act's objectives. . . . The question of cost allocation, on the other hand, is a question to be resolved between employer and employee. In our judgment, it is an appropriate subject for collective bargaining.' " (*Id.*, at p. 203, fns. omitted.) The *Budd* court further observed that, unlike other measures specifically imposing on the employer certain expenditures to promote employee health and safety, neither the Act nor the regulation explicitly required that the employer finance the implementation of the safety measure in question. (*Id.,* at p. 206.) And since the protective footwear was

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[3]29 C.F.R. § 1910.132(a) provides: "Protective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers, shall be provided, used, and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards of processes or environment, chemical hazards, radiological hazards, or mechanical irritants encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact."

required irrespective of cost allocation, the decision of the Commission in no way diminished "the employer's obligation to ensure that safety shoes are in fact worn when required." (*Ibid.*; fn. omitted.)[4]

If reasonably possible, the courts have an obligation to construe a statute so as to avoid doubts regarding its constitutionality. (People v. Smith (1983) 34 Cal.3d 251, 259.) I question whether a state health and safety standard could be interpreted to impose an unconditional, nontransferrable obligation on the employer to pay the full expense of required personal safety equipment without violating federal preemption principles. (See U.S. Const. art. VI, cl. 2.) For if the state law oversteps its purpose of assuring worker safety and health (See Lab. Code, § 6300) so as to effect an unjustifiable interference with economic subjects traditionally left to the bargaining process,[5] the policies favoring collective bargaining and

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[4]Compare Forging Industry Ass'n v. Secretary of Labor (4th Cir. 1985) 773 F.2d 1436, 1451-1452, where the Fourth District Court of Appeals upheld the validity of a regulation promulgated under Fed/OSHA which expressly mandates that employers must provide hearing protectors at no charge to all employees exposed to an 8-hour time-weighted average of 85 decibels or more. (29 C.F.R. § 1910.95(i)(1).)

[5]Illustrative is American Textile Mfrs. Inst. v. Donovan (1981) 452 U.S. 490, 540 [69 L.Ed.2d 185, 220], where the U.S. Supreme Court emphasized that the federal Occupational Safety and Health Act "in no way authorizes OSHA [Occupational Safety and Health Administration] to repair general unfairness to employees that is unrelated to achievement of health and safety goals, . . ." There, the court considered the validity of an OSHA provision relating to the use of respirators to protect employees from exposure to cotton dust which required the employer to give employees unable to wear a respirator the opportunity to transfer to another position. (*Id.*, 452 U.S. at pp. 536-537 [69 L.Ed.2d at pp. 218-219].) When such transfer occurred, the provision also required the employer to guarantee that the

industrial self-government which underlie federal labor relations law (see Barrentine v. Arkansas-Best Freight System (1981) 450 U.S. 728, 735 [67 L.Ed.2d 641, 650]) may well prevail over and render the state statute unconstitutional. (Cf. Terminal R. Assn. v. Brotherhood of R. Trainmen (1943) 318 U.S. 1, 7-8 [87 L.Ed. 571, 578]; Industrial Welfare Com. v. Superior Court (1980) 27 Cal.3d 690, 728, particularly fn. 16; Hentzel v. Singer Co. (1982) 138 Cal.App.3d 290, 296-297, fn. 4.) Even where a competing claim in a second forum is based on a *federal* statute, deference is given to an arbitrator's labor relations decison which resolves rights arising out of the collective bargaining process unless the federal statute in question guarantees employees a minimum right which cannot be waived or abridged by contract. (See Barrentine v. Arkansas-Best Freight System, supra, 450 U.S. at pp. 736, 745 [67 L.Ed.2d at pp. 650, 656-657]; see also Alexander v. Gardner-Denver Company (1974) 415 U.S. 36 [39 L.Ed.2d 147]; McDonald v. West Branch (1984) ____ U.S. ____ [80 L.Ed.2d 302].) Common sense would seem to dictate that where, as here, the necessity of

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employee suffered no loss of earnings or other employment rights or benefits. (*Ibid.*) The court concluded that OSHA had acted beyond its statutory authority when it issued the wage guarantee portion of the regulation. (*Id.*, 452 U.S. at p. 540 [69 L.Ed.2d at p. 220].) Reasoned the court: "... OSHA never explained the wage guarantee provision as an approach designed to contribute to increased health protection. Instead the agency stated that the 'goal of this provision is to minimize any adverse economic impact on the employee by virtue of the inability to wear a respirator.' " (*Id.*, 452 U.S. at p. 583 [69 L.Ed.2d at p. 219].) Other post hoc rationalizations offered by the agency, while they might have merit, did not serve as a sufficient predicate for agency action. (*Id.*, 452 U.S. at p. 539 [69 L.Ed.2d at p. 220]; but see United Steelworkers of America, etc. v. Marshall (D.C. Cir. 1981) 647 F.2d 1189, 1236, cert. den., 453 U.S. 913 [69 L.Ed.2d 997].)

wearing foot protection is not in question, the economic issue of who shall pay for such clothing is a matter so close to the heart of free labor market arrangements that it should be of no concern to the Division so long as a binding agreement between labor and management has been reached.

Because an existing collective bargaining agreement made Simpson responsible for paying only $4 toward the cost of safety shoes worn by its employees, I would hold that the Division had no statutory authority to issue the contested order requiring Simpson to pay their full cost. Accordingly, I would issue the writ of mandate as prayed.

PUGLIA, P.J.

APPENDIX B

IN THE

COURT OF APPEAL OF THE
STATE OF CALIFORNIA

IN AND FOR THE

THIRD APPELLATE DISTRICT

3 Civil 21516

SIMPSON PAPER COMPANY,
Petitioner,

vs.

DIVISION OF OCCUPATIONAL SAFETY &
HEALTH OF THE DEPARTMENT OF
INDUSTRIAL RELATIONS,
Respondents.

By the Court:

Petitioner's petition for rehearing is denied.

Dated: July 18, 1986

SPARKS, Acting P. J.

* * * * *

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APPENDIX C

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

3rd District, Civil No. 21516

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK

SIMPSON PAPER COMPANY,
Petitioner

v.

DIVISION OF OCCUPATIONAL SAFETY
AND HEALTH, etc.,

Respondent.

Petition for review DENIED.

Filed August 28, 1986.

BIRD

Chief Justice

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On November 3, 1986, I served the within Petition for a Writ of Certiorari, in re: "Simpson Paper Company vs Division of Occupational Safety and Health of the Department of Industrial Relations for the State of California" in the United States Supreme Court, October Term, 1986 No. .....;

on the Parties in said action, by placing three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

Michael D. Mason
Chief Counsel
Division of Occupational Safety and Health
525 Golden Gate Avenue, Room 616
San Francisco, California 94102

All parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on November 3, 1986, at Los Angeles, California

Timothy M. Sill

TIMOTHY M. SILL

Supreme Court, U.S.
FILED
NOV 21 1986
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 86-750

In the Supreme Court

OF THE

United States

OCTOBER TERM 1986

SIMPSON PAPER COMPANY,

Petitioner,

VS.

DIVISION OF OCCUPATIONAL SAFETY AND HEALTH
OF THE
DEPARTMENT OF INDUSTRIAL RELATIONS FOR THE
STATE OF CALIFORNIA,

Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA IN AND FOR THE THIRD APPELLATE DISTRICT

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No. 86-750

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SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA IN AND FOR THE THIRD APPELLATE DISTRICT

Petitioner, Simpson Paper Company (hereinafter also referred to as "Simpson" or the "Employer"), respectfully submits this supplemental brief in support of its petition for a writ of certiorari to the Court of Appeal of the State of California in and for the Third Appellate District. Simpson's petition for a writ of certiorari was docketed in this Court on November 7, 1986.[1]

[1]Simpson's rule 28.1 list is set forth at page i of its petition for a writ of certiorari.

On November 10, 1986, this Court noted probable jurisdiction in *Fort Halifax Packing Company, Inc. v. Marvin W. Ewing*, Case No. 86-1-341 ASX (hereinafter *"Fort Halifax"*.) The Employer became aware of the case shortly thereafter when the Court's decision was reported in the New York Times and in the Bureau of National Affairs' Daily Labor Report.

In *Fort Halifax*, this Court noted probable jurisdiction with respect to a question which is virtually identical to the issue raised by Simpson in the instant case (hereinafter also the "*Simpson* case"). The question presented in *Fort Halifax* is as follows:

> Whether the National Labor Relations Act, 29 U.S.C. § 141 *et seq.*, preempts a state statute that discriminates against unionized employers (i) by compelling them to reach an agreement on a mandatory subject of bargaining (severance pay) or incur specified liability and (ii) by allowing nonunion employers unilaterally to avoid the specified liability.

Jurisdictional statement of Fort Halifax Packing Company, Inc., p. i.[2] The question presented in the *Simpson* case is:

> Whether federal labor law preempts a state agency's order where that order is contrary to the employer's collective bargaining agreement and an arbitration award under that agreement and where the order attempts to alter the economic terms of the agreement.

Petition for a writ of certiorari of Simpson, p. i.

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[2]The other question in *Fort Halifax*, whether the Employee Retirement Income Security Act preempts the state statute, is not related to the *Simpson* case.

In each case, the state, for allegedly salutary reasons, has rewritten the collective bargaining agreement between an employer engaged in commerce and the union representing its employees *by altering* a mandatory subject of bargaining. Moreover, in each case, the mandatory subject of bargaining is part of the parties' economic settlement, *i.e.* the "wage package", undeniably the heart of any collective bargaining agreement.

In *Fort Halifax*, the State of Maine has attempted to require the employer to include a severance pay provision in its contract with the union. In the *Simpson* case, the State of California, *without claiming there was a safety-related reason* until the case reached the state Supreme Court[3], has attempted to require that the Employer pay the entire cost of its employees' safety shoes despite the Employer's collective bargaining agreement with the union and an Arbitrator's decision which made it clear the Employer's economic obligation is substantially less.

Moreover, in *Fort Halifax,* the collective bargaining agreement was silent with respect to severance pay, lending superficial credence to the state's claim that it did not "change" the parties' agreement on the subject. *Bureau of Labor Standards v. Fort Halifax Packing Company,* 510 A. 2d 1054, 1057 (1986). In the *Simpson* case, however, the collective bargaining agreement was far from silent on the safety shoe issue. The contract in *Simpson* was interpreted by an established labor Arbitrator to require only the payment of a nominal portion of the cost of the safety shoes, and the Employer and union negotiated with respect to the very issue, *i.e.,* the amount the Employer was to contribute toward a pair of shoes. Petition for a writ of

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[3]Even then, the state's after the fact argument was extremely weak and speculative, suggesting only that employees "may hesitate", whatever that means, to replace the equipment. Answer to Petition for Review, p. 10.

certiorari of Simpson, pp. 4-5, 8. Consequently, the *Simpson* case presents an even more compelling need for this Court's review.

In sum, this Court's decision to review *Fort Halifax* underscores the validity of Simpson's position with respect to its petition for a writ of certiorari.[4] Moreover, in the event Fort Halifax' position is sustained on review, Simpson could be in the position of having been absolutely correct as a matter of law, but unable even to cite Fort Halifax, as Simpson's litigation would have become final. To avoid such an unfair situation, and for the reasons set forth in this supplemental brief and in Simpson's petition for a writ of certiorari, it is respectfully submitted that Simpson's petition for a writ of certiorari be granted.

Respectfully submitted,

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---

[4]In light of the virtually identical legal issues raised in both cases, *Fort Halifax* and *Simpson* could be argued together or consecutively.

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On November 21, 1986, I served the within Supplemental Brief in re: "Simpson Paper Company vs. Division of Occupational Safety and Health of the Department of Industrial Relations for the State of California" in the United States Supreme Court, October Term 1986, No. 86-750;

on the Parties in said action, by placing three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

Michael D. Mason
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San Francisco, California 94102

All Parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on November 21, 1986, at Los Angeles, California

Ce Ce Medina

CE CE MEDINA

Supreme Court, U.S.
FILED
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No. 86-750

In the Supreme Court

OF THE

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OCTOBER TERM, 1986

SIMPSON PAPER COMPANY,
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v.

DIVISION OF OCCUPATIONAL SAFETY AND HEALTH
OF THE DEPARTMENT OF INDUSTRIAL RELATIONS
FOR THE STATE OF CALIFORNIA,
Respondent.

On Appeal for a Writ of Certiorari to the Court of Appeal of the State of California in and for the Third Appellate District

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Order issued by the Division of Occupational Safety and Health, which requires that an employer provide and pay for safety shoes, is preempted by federal labor law 1) where the employer's custom and practice of providing partial reimbursement for those employees who voluntarily chose to wear safety shoes occurred at a time prior to the determination that such shoes were required safety equipment and 2) where the employer never acknowledged its duty to provide and pay for such equipment at the inception of the collective bargaining process.

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No. 86-750

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RESPONDENT'S BRIEF IN OPPOSITION

OPINION BELOW, JURISDICTION, AND STATUTES INVOLVED

The Opinion below, jurisdiction of this Court and relevant constitutional and statutory provisions are set out at pages 1 to 3 of the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Petitioner, Simpson Paper Company (hereinafter referred to as "Simpson" or "Petitioner"), requests that this Court invoke its jurisdiction to review a decision of the California Court of Appeal for the Third Appellate District which upheld the decision of the Division of Occupational Safety and Health of the State of California (hereinafter referred to as the "Division" or "Cal/OSHA"), which required that Simpson provide and pay for the cost of safety shoes for employees working at various locations

of its Shasta Mill, where the Division had determined that such safety shoes were necessary for employee protection. Simpson argues that it had a collective bargaining agreement prior to that time in which it was only required to pay a small portion of the cost of safety shoes. Thus, Simpson urges that the Division's Order abridges national labor relations law. However, as will be seen in the forthcoming discussion of the factual background of this case, the so-called collective bargaining agreement arose as a custom and practice years before when employees were not required to wear safety shoes but could, on their own volition, purchase them and receive partial reimbursement.[1] Only as a result of the Divison's Order, which was issued on September 19, 1980, were safety shoes (in contrast to other types of foot protection such as steel toe caps) declared to be required safety equipment which was to be provided and paid for by the employer. The law of California requires generally that employers both provide and pay for required safety equipment. *Bendix Forest Products v. Division of Occupational Safety and Health* (1979) 25 Cal.3d 465, 470-472 [158 Cal.Rptr. 882, 600 P.2d 1339]. Unanswered by case authority in California is the impact of a collective bargaining agreement with regard to the employee's statutory entitlement for payment of such equipment by the employer. *Bendix, supra,* 25 Cal.3d at 72 [158 Cal.Rptr. at 886] fn. 7. However, at no time has Simpson ever acknowledged at the inception of any bargaining process that as an employer it was required to provide and pay for this equipment, and then given this acknowledgement of its statutory obligation, attempt to shift the burden to employees by provision of some other economic benefit. The Division maintains that under such circumstances the Division's Order could not possibly abridge federal labor law as it might impact the custom and practice of partial reimbursement which occurred prior to the time that either Simpson or the Division determined that safety shoes were required equipment.

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[1] In fact, none of the collective bargaining agreements prior to the issuance of the Division's Order to Take Special Action remotely addressed the subject of provision and payment for safety equipment in general or safety shoes in particular.

A.

FACTUAL BACKGROUND

Simpson took over operation of the Shasta Mill from a prior owner in 1972. At that time there existed a custom and practice in which employees who wished to purchase safety shoes were reimbursed in the amount of $2.00 per pair of shoes. This practice was continued by Simpson. At some time during 1974 the amount of reimbursement was increased to $4.00. There was no testimony that this increase occurred as the result of negotiations or that the raise in amount coincided with the renegotiation of the contract.[2] Prior to 1978, Simpson's "employees could choose to go without foot protection, to wear safety shoes, or to wear toe caps." (Brief of Simpson Paper Company, July 2, 1981, p. 9, filed with the Division.) The Court of Appeal determined that in none of the collective bargaining agreements (signed in 1974, 1976, 1977, and 1979) was there a reference to payment for safety shoes or any other safety equipment. Moreover, the Court determined that the issue was never formally discussed as a part of contract negotiations. (Decision of California Court of Appeal, at Appendix, p. A-2, of Petition.) When in November, 1978, Simpson issued an order requiring all employees in the Finishing Department to wear safety shoes, the United Paperworkers International Union, Local 1101, AFL-CIO (hereinafter referred to as the "Union") filed a grievance as a result of Simpson's refusal to pay for these safety shoes which were now mandatory.

As the result of an inspection of Simpson's Shasta Mill, the Division on September 19, 1980, issued an Order to Take Special Action, which required that employees who were engaged in eleven activities or areas be provided foot protection. This Order was contested by Simpson and in accord with then existing

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[2] These factual findings were made in a Decision by the Hearing Officer sitting on behalf of the Division at page 11. The Decision was rendered by the Hearing Officer on November 9, 1981, and was formally transmitted to the parties on January 12, 1982 by Art Carter, Chief of the Division. The Division's Decision was then appealed to the California Court of Appeal. Hereinafter the Division's administrative decision will be referred to as Decision of Hearing Officer, p. .

provisions of Labor Code 6308, a hearing was held before the Division. (Former Labor Code section 6308, Stats. 1973, Ch. 993, amended by Stats 1977, Ch. 62) In the context of this hearing, the parties stipulated that Simpson paid the entire cost of toe caps but not the entire cost for safety shoes or boots. (Decision of Hearing Officer, p. 7) Simpson argued that with reference to five of the eleven categories, workers would adequately be protected by wearing toe caps instead of safety shoes required by the Order. However, the Division hearing officer found that toe caps were not an appropriate type of permanent protection for any classification of employees in the Shasta Mill and affirmed the Division Order requiring that safety shoes or boots be provided. (Decision of Hearing Officer, pp. 12-13) Prior to the hearing officer's decision, a labor arbitrator, who was designated to hear the earlier-referenced Union grievance, determined that the contract did not require that Simpson pay the entire cost of safety shoes, but rather that the custom and practice that had been in existence since 1974 limited Simpson's obligation to partial reimbursement of $4.00 per pair of shoes. In reaching her decision that not only was Simpson required to provide safety shoes, but also pay for them, the Division hearing officer considered the labor arbitrator's decision. To the extent that the labor arbitrator determined that the contract between Simpson and the Union did not require full reimbursement for safety shoes, the Division hearing officer agreed. (Decision of Hearing Officer, p. 33) However, the Division hearing officer concluded that the contract was not binding in terms of the ability of the Division to order payment in light of the fact that the labor arbitrator's decision, which construed a custom and practice of providing partial reimbursement for safety shoes when such equipment was purchased at the volition of an employee, was not determinative of employee rights for provision and payment for such equipment by the employer when the use of such equipment became mandated by law.

B.

SUBSEQUENT EVENTS FOLLOWING THE DIVISION'S DECISION AND SUBMISSION OF THE CASE TO THE COURT OF APPEAL

In June 1982, three months before this case was first submitted to the California Court of Appeal, bargaining negotiations took place between Simpson and the Union; the employer's $4.00 reimbursement policy was continued. This practice was again renewed in 1985 with increased amounts of reimbursement. However, neither the 1982 nor 1985 bargaining sessions contained any statement or evidence that employees were waiving a legal entitlement that they had under the California Labor Code pursuant to the Division's Order to Take Special Action. There is no evidence that the Union ever intended to forfeit such an entitlement in any of these sessions. To the contrary, the record of negotiation reflects that from the moment safety shoes were first required by Simpson as a condition of employment, there existed a continuing and consistent controversy concerning whether the employer or employees bore the responsibility of payment for these required safety devices. The Declaration of Dean Childers, Personnel Manager for Simpson, (which Declaration was submitted with Simpson's Petition for Rehearing before the California Court of Appeal), does not provide any evidentiary support that an agreement existed between the Union and Simpson in which there was a waiver of employee rights under the Labor Code and the Division's Order to Take Special Action. More importantly, the Declaration of Richard James, President of the Union, (which Declaration was submitted with the Division's Opposition to Petition for Rehearing before the California Court of Appeal), makes clear that the Union did not intend to waive any rights of those employees subject to the Division's Order to Take Special Action.[3] Therefore, neither in negotiations just prior to submis-

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[3] In his declaration, Mr. James states that during the pendency of the litigation (the case was submitted to the Court in 1982 and decided in 1986), the Union sought to assure interim financial support and not to waive any legal rights for complete reimbursement pursuant to the Division's Order (Declaration of Richard James, pp. 1-2.)

sion of the case to the Court of Appeal nor in subsequent negotiations did employees waive any rights pursuant to the Labor Code and the Division's Order to Take Special Action bearing upon the employer's concommitant duty to provide and pay for the required safety equipment for enumerated employees.

ARGUMENT
I

THE DIVISION'S ORDER WHICH REQUIRED THAT SIMPSON PROVIDE AND PAY FOR SAFETY SHOES FOR SPECIFIED EMPLOYEES IS NOT PREEMPTED BY FEDERAL LAW

Simpson urges that this case presents a clear-cut issue of far reaching importance in that the Division's Order to Take Special Action directly conflicts with a specific provision of Simpson's collective bargaining agreement. What Simpson is in fact referring to is a nonexistent written provision in a collective bargaining agreement which at best harks back to a custom and practice which was never the subject of any collective bargaining session. Moreover, the custom and practice occurred at a time when safety shoes were not required equipment and only those employees who voluntarily chose on their own initiative to purchase them could qualify for Simpson's partial reimbursement policy. Rather than constituting a specific economic provision which was the subject of rigorous discussion during the course of collective bargaining concerning which employees were required to wear safety shoes and what amount of reimbursement would be appropriate under such circumstances, the so-called collective bargaining agreements at most point to a prior period of time in which partial reimbursement was allowed to employees who on their own volition chose to purchase such equipment. As will be seen in the forthcoming discussion, the Division's Order under such circumstances neither abridges nor is preempted by federal labor law.

The Court of Appeal in this case concluded that the custom and practice of partial reimbursement for *voluntary* use of safety shoes by employees became a part of the contract. (The Division

had argued that a custom and practice of partial reimbursement concerning the voluntary use of safety equipment did not constitute a waiver of the employer's duty to both provide and pay for such equipment when it was subsequently required by law. For these reasons, the Division maintained that the bargaining agreement did not encompass this issue.) However, the Court also pointed out that "prior to its [The Order's] issuance, there existed no specific mandatory duty on the part of the employer to provide particularly described equipment for the enumerated employees." (Decision of the Court of Appeal, at Appendix, p. A-11 of Writ)[4] Equally important, during the time the custom and practice existed for partial reimbursement of safety shoes, Simpson did not require employees to utilize such shoes as a condition of employment. (Brief of Simpson, July 2, 1981, filed with the Division) Under these facts, the Court concluded,

> Where, as here, there was no mutually recognized obligation of the employer to pay for the safety shoes for the enumerated employees before the order, it is untenable to urge that the employees bargained away that to which they had a statutory entitlement. (Decision of Court of Appeal, at Appendix, p. A-11 of Writ.)

For this reason, the Court of Appeal determined that it need not reach the issue concerning whether payment for required safety equipment could be shifted by the employer to the employee.

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[4] Simpson's argument that the issue in this case is purely one of economics, who shall purchase safety shoes, and that there is no dispute that shoes shoes should be worn, does not comport with its litigation posture before the Division. In its appeal of the Order to Take Special Action, Simpson challenged the need for any type of foot protection in two of the eleven designated areas. Moreover, with reference to five of the nine remaining areas where it acknowledged the need for foot protection, Simpson asserted that employees in these five categories would be adequately protected by wearing toe caps instead of the safety shoes specified in the Order. (Decision of Hearing Officer, pp. 12-13.) Given this background, Simpson's contention that the bargaining agreement addressed this issue is belied by the fact that from its own perspective it denied the need for foot protection in some areas of its mill and would have specified only a lower form of protection in others.

As stated earlier, California law generally requires that the employer both provide and pay for safety equipment. *Bendix Forest Products Corporation v. Division of Occupational Safety and Health* (1979) 25 Cal.3d 465 [158 Cal.Rptr. 882, 600 P.2d 1339], *Oakland Police Officers Association v. City of Oakland* (1973) 30 Cal.App.3d 96 [106 Cal.Rptr. 134], Labor Code 6401. Given this statutory background and case interpretation thereof, if an employer in California were to shift through collective bargaining the duty of payment for required safety devices to the employee, the Division maintains that any such bargaining sessions must begin with the employer acknowledging the concommitant duty to provide and pay for required safety devices. Absent such an acknowledgement on the employer's part, there could be no meaningful bargaining away or waiver of such a statutory entitlement. Neither a union nor an individual employee should be put in the position of imploring or begging the employer to fulfill its statutory duties and, failing to accomplish this objective, being deemed to waive the prerogative to benefit from statutory rights or entitlements. Clearly in this case, Simpson never at any collective bargaining session acknowledged that it had both the duty to provide and pay for required safety devices. Simpson engaged at best in providing an insignificant contribution toward the cost of safety shoes when employees chose to purchase them on their own volition. In a situation where the employer never acknowledged its duty to provide and pay for required safety equipment, the Division maintains that a collective bargaining agreement could not be the vehicle for waiving statutory rights.

Given this background, the Division maintains that the Order in this case does not impermissibly intrude upon the custom and practice which was deemed to be incorporated into the collective bargaining agreements. In fact, the Division's Order in this case, which required that Simpson provide safety shoes to employees in areas where they had not previously been required and in areas in which less protective safety equipment (steel toe caps) had been permitted, and which required that the employer pay for the safety equipment, falls within the type of state regulation of health, safety and welfare of workers which has long been recognized by this Court as not being abridged by federal labor law. *Terminal R. Association v. Brotherhood of R. Trainmen*

(1943) 318 U.S. 1, 6-7. In the *Terminal* case, *supra,* this Court upheld a state safety regulation which was challenged on the ground that it specifically conflicted with a provision in the collective bargaining agreement. This decision was relied upon by the California Supreme Court in resolving whether the California Industrial Welfare Commission could issue orders to employers to establish minimum wages, maximum hours, or standard conditions of employment to protect health and safety of workers. *Industrial Welfare Commission v. Superior Court* (1980) 27 Cal.3d 69 [166 Cal.Rptr. 331, 613 P.2d 579] In this case, the California Hotel and Motel Association argued that because the aforementioned matters were subject to collective bargaining, this state lacked power to establish minimum standards for the protection of workers. The California Supreme Court phrased this argument in the following manner:

> Taken at face value, the employer's contentions in this regard would have the effect of precluding the IWC from regulating with respect to *any* of the matters within its jurisdiction. Under each of the labor statutes which apply to the industries regulated by the Commission—the National Labor Relations Act (NLRA) 29 U.S.C. section 151, *et seq.,* The Railway Labor Act (NLRA) 45 U.S.C. section 151, *et seq.,* the Agricultural Labor Relations Act (ALRA) section [Labor Code] 1140, *et seq.)*—"wages, hours and working conditions" constitute mandatory subjects of collective bargaining. Thus, if these labor statutes in fact prohibited all governmental regulation on any matter that is subject to employee-employer bargaining, neither the IWC, nor any other state or federal agency would have authority to prescribe minimum wages or maximum hours, to promulgate occupational safety and health standards, or to prohibit discriminatory employment practices. The mere recitation of the logical consequences of the employers' argument, of course, signals the extreme tenuousness of the employers' contention. *Industrial Welfare Commission, supra,* 27 Cal.3d 725-726 [166 Cal.Rptr. at 351-352].

Citing this Court's decision in the *Terminal* case, *supra,* the California Supreme Court went on to conclude

> the fact that these matters may also constitute proper, indeed "mandatory," subjects of collective bargaining does not preclude the state from adopting minimum standards to protect the welfare of workers who may not enjoy sufficient bargaining strength to obtain adequate protection from their employers at the bargaining table. *Industrial Welfare Commission, supra,* 27 Cal.3d at 728 [166 Cal.Rptr. at 353].

In *Metropolitan Life Insurance Company v. Massachusetts* (1985) 471 U.S. ____ [105 S.Ct. 2380, 85 L.Ed.2d 728] [hereinafter *Metropolitan*] this Court articulated two distinct NLRA preemption principles:

> The so-called *Garmon* rule (citation omitted) protects the primary jurisdiction of the NLRB to determine in the first instance what kind of conduct is either prohibited or protected by the NLRA.
>
> A second preemption doctrine protects against state interference with policies implicated by the structure of the Act itself by preempting state law and state causes of action concerning conduct that Congress intended to be unregulated.
>
> *Metropolitan, supra,* 105 S.Ct. at 2394.

Simpson appears to argue that this latter doctrine of preemption bars the Division's Order in this case. However, in *Metropolitan, supra,* this Court held that nothing in the legislative history of the National Labor Relations Act, 29 U.S.C. 151, *et seq.,* (hereinafter NLRA), suggests that federal law must preempt any state attempt to impose minimum labor standards on parties to a collective bargaining agreement. In *Metropolitan,* this Court distinguished prior decisions concerning types of conduct that a state cannot impinge upon, which constituted courses of conduct that Congress intended to be unregulated. *Teamsters v. Morton* (1964) 377 U.S. 252, (in which an Ohio law that prohibited secondary boycotts was preempted because such conduct was neither prohibited nor protected under the NLRA), *Machinists v. Wisconsin Employment Relations Commission* (1976) 427 U.S. 132, (in which state attempts to penalize a concerted refusal to work overtime were declared impermissible given Congressional intent that such conduct be unregulated). However, in *Metropoli-*

tan, supra, this Court rejected insurers' challenges to a Massachusetts law which were premised on a theory that because Massachusetts specified minimum mental health care benefits for employee health care plans, such action constituted an impermissible intrusion upon the collective bargaining process. In essence, the insurers were arguing that federal labor law prevented states from establishing minimum employment standards that would otherwise be subject to collective bargaining between management and labor. Thus, because Congress' ultimate concern was to leave parties free to reach agreement about specific contract terms, the insurers argued that any law that interfered with the end result of bargaining was *per se* forbidden. In rejecting this argument, this Court held

> No incompatibility exists, therefore, between federal rules designed to restore the equality of bargaining power, and state or federal legislation that imposes minimum substantive requirements on contract terms negotiated between parties to labor agreements, at least so long as the purpose of the state legislation is not incompatible with these general goals of the NLRA.
>
> Accordingly, it has never been argued successfully that minimum labor standards imposed by other *federal* laws were not to apply to unionized employers and employees. (Citations omitted) Nor has Congress ever seen fit to exclude unionized workers and employers from laws establishing federal minimum employment standards. We see no reason to believe that for this purpose Congress intended state minimum labor standards to be treated differently from minimum federal standards.
>
> Minimum state labor standards affect union and nonunion employees equally, and neither encourage nor discourage the collective bargaining processes that are the subject of the NLRA. Nor do they have any but the most indirect effect upon the right of self organization established in the Act . . . . Most significantly, there is no suggestion in the legislative history of the Act that Congress intended to disturb the myriad state laws then in existence that set minimum labor standards, but were unrelated in any way to processes of

> bargaining or self organization. To the contrary, we believe that Congress developed the framework for self-organization and collective bargaining of the NLRA within the larger body of state law promoting public health and safety. The States traditionally have had great latitude under their police powers to legislate " 'to the protection of the lives, limbs, health, comfort, and quiet of all persons.' " (Citations omitted) "States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State. Child labor laws, minimum and other wage laws, laws affecting occupational health and safety are only a few examples." (Citation omitted) *Metropolitan, supra,* 105 S.Ct. at 2397-2398.

California law provides generally that employers must provide and pay for safety equipment. Labor Code 6401, *Bendix Forest Products v. Division of Occupational Safety and Health* (1979) 25 Cal.3d 465 [158 Cal.Rptr. 882, 600 P.2d 1339]. In this case, the Division implemented this law by issuing an Order to Simpson which required that it provide and pay for safety shoes in numerous areas of its Shasta Mill where previously no foot protection was utilized or a less satisfactory form of protection was deemed acceptable. Simpson's only defense to the Order is that there previously existed a custom and practice of providing partial reimbursement to employees who voluntarily chose to purchase safety shoes which were neither required by Simpson nor by the law. The Division submits that under the facts of this case the Order does not impermissibly impact the collective bargaining process and constitutes permissible state regulation within this Court's decision in *Metropolitan, supra.*

II

THE COURT OF APPEAL PROPERLY DETERMINED THAT DEFERRAL TO THE LABOR ARBITRATOR'S DECISION WAS NOT REQUIRED UNDER THE FACTS OF THIS CASE

In light of the decision by this Court in *Barrentine v. Arkansas-Best Freight System* (1981) 450 U.S. 728, 737, Simpson's argu-

ment that the Division was required to defer to the arbitrator's decision is without merit. In that case, this Court held that employees could bring an action in federal District Court alleging violation of minimum wage provisions of the Fair Labor Standards Act even though a wage claim based on the same underlying facts was submitted to a joint grievance committee pursuant to the collective bargaining agreement and was unsuccessful. In reversing the Court of Appeals decision which held that the District Court was correct in not addressing the merits of the claim in light of the earlier grievance, this Court held

> Not all disputes between an employee and his employer are suited for binding resolution in accordance with the procedures established by collective bargaining. While courts should defer to an arbitral decision where the employee's claim is based on rights arising out of the collective bargaining agreement, different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers. *Barrentine, supra,* 450 U.S. 737

While arbitrators' decisions can be admitted into evidence, there are no existing standards which govern the weight to be afforded such a decision. In *Alexander v. Gardner Denver Company* (1974) 415 U.S. 36, this Court held that such determinations

> were discretionary with regard to the facts and circumstances of each case. Relevant factors include the existence of provisions in the collective bargaining agreement that conform substantially with the [statute], the degree of procedural fairness in the arbitral forum, adequacy of the record with respect to the issue of discrimination, and the special competence of particular arbitrators. Where an arbitral determination gives full consideration to an employee's [statutory] rights, a court may properly accord it great weight. *Alexander, supra,* 415 U.S. at 60, fn. 21.

Applying these criteria to the decision issued by the arbitrator in this case, there is no basis for such deferral. The only issue before the arbitrator was whether the employer had a contractual duty to pay for the entire price of the safety shoes. The arbitrator

concluded that "there is nothing in the agreement which gives the arbitrator the authority to insert that condition in the collective bargaining agreement." (Brief of Simpson, July 2, 1981, Exhibit G, p. 7). This holding is consistent with the decision of the hearing officer, who also concluded that the employer had no contractual obligation to pay for the shoes. (Decision of Hearing Officer, p. 33) There is no conflict between the arbitrator and the hearing officer concerning the interpretation of the language of the contract. However, the arbitrator, in dicta, concluded that the employer had no duty to pay for the full price of the shoes because the past custom and practice of providing a $4.00 reimbursement for employees who voluntarily chose to purchase safety shoes became part of the contract. As the hearing officer correctly found, the arbitrator's decision did not give serious consideration to the employee's statutory rights or the public policy underlying the enactment of the California Occupational Safety and Health Act, Labor Code 6300, *et seq.* and for these reasons should not act as a bar to the Division's Order.

The basic policy underlying the California Occupational Safety and Health Act is reflected in the fact that "The primary responsibility for safety has been placed on the employer." *Bendix Forest Products Corporation v. Division of Occupational Safety and Health* (1979) 25 Cal.3d 465, 470-471 [158 Cal.Rptr. 882, 885, 600 P.2d 1339] Labor Code section 6400 states that "Every employer shall furnish employment and a place of employment which are safe and healthful for the employees therein."

As previously discussed (at pp. 9-10), California law generally requires that the employer both provide and pay for safety equipment. *Bendix, supra, Oakland Police Officers Association v. City of Oakland* (1973) 30 Cal.App.3d 96 [106 Cal.Rptr. 134], Labor Code 6401. Thus, California employees are beneficiaries of a general statutory entitlement for provision and payment for required safety equipment.

Given this background, the labor arbitrator's determination, that the custom and practice of providing partial reimbursement for those employees who voluntarily chose to wear safety shoes became part of the contract, could not possibly be deemed a binding decision construing statutory rights when safety shoes

became mandatory equipment as a matter of law. The hearing officer properly determined that there was no waiver by employees of their statutory right to provision and payment for such safety equipment based upon the past practice of partial reimbursement when such safety shoes were neither required by Simpson nor by the law.

III

THE COURT OF APPEAL DECISION IN THIS CASE DOES NOT UNDULY BURDEN COLLECTIVE BARGAINING

Simpson points to developments just prior to submission of the case to the Court of Appeal (which were never formally presented to the Court by Simpson) and to events subsequent to submission of the case to premise its argument that the Court's decision fails to take cognizance of events which it did not know about. Such criticism seems hardly warranted. Moreover, Simpson's argument that, as a result of negotiations in 1982 and 1985, in which the amount of partial reimbursement was continued and then increased respectively, the Union sought to bargain away its rights under the Labor Code and the Division's Order is refuted by the declaration of the Union President, Richard James. He stated that by entering negotiations to attempt to assure interim relief during the pendency of the litigation, the Union was in no way waiving any rights that it obtained pursuant to the Division's Order to Take Special Action for complete reimbursement for required safety shoes. (Declaration of Richard James, pp. 1-2)

The argument that the Court of Appeal decision could place in question collective bargaining agreements is sheer speculation.

It should be noted that this is not a case involving a Division Order issued to an employer who in good faith entered into collective bargaining agreements with the Union, began the negotiating process by acknowledging its duty to provide and pay for safety equipment, offered a distinct economic benefit in lieu of fulfilling this statutory obligation, and memorialized this agreement in writing. To date, no Division Order has been issued with reference to such a collective bargaining process. Rather, this case

at best involves a custom and practice of providing partial reimbursement for employees who voluntarily chose to purchase safety shoes when they were neither required by Simpson nor the law, in which there was no discussion of the custom and practice at any bargaining session prior to issuance of the Division's Order, and in which the written collective bargaining agreement neither referenced provision and payment for safety equipment in general nor safety shoes in particular. Given the facts in this case, the Court of Appeal decision upholding the Division Order cannot be said to have unduly burdened collective bargaining negotiations prior to issuance of the Division's Order.

IV

THE COURT OF APPEAL DECISION IS CONSISTENT WITH THE FEDERAL-STATE RELATIONSHIP ENVISAGED BY THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970

Simpson's reliance on the decision in *Budd Company v. Occupational Safety and Health Review Commission,* 513 F.2d 201 (3d. Cir. 1975) for the proposition, that because federal occupational safety and health law does not genefally require the employer to pay for required safety equipment, the Court of Appeal decision is contrary to, and therefore in conflicIt with, federal law, is misplaced. In *Budd, supra,* the Union, not the agency, sought to compel the employer to pay for protective equipment. The secretary did not advance a claim that the employer had an obligation to pay. The Review Commission affirmed the Secretary's position. The only question on appeal was whether the Commission's decision was arbitrary, capricious, or an abuse of discretion. *Id.* at 204. In upholding the decision of the Commission, the Third Circuit stated its duty to accord "great deference" to the agency's construction of the language in question. See also *Concrete Construction Company v. Occupational Safety and Health Review Commission,* 598 F.2d 1031 (6th Cir. 1979). According the same deference to Cal/OSHA's interpretation would lead to an affirmation of the Division's Order in this case. *Udall v. Tallman* (1965) 380 U.S. 1, 16, *Davey Tree Surgery Company v. Occupational Safety and Health Appeals*

Board (1985) 167 Cal.App.3d 1232, 1243 [213 Cal.Rptr. 806, 812].

More importantly, the federal-state relationship envisaged by section 18 of the Occupational Safety and Health Act of 1970, 29 U.S.C. 667, clearly permits states to provide a more protective program than the federal counterpart. *United Air Lines, Inc. v. Occupational Safety and Health Appeals Board* (1982) 32 Cal.3d 762, 771-772 [187 Cal.Rptr. 387, 393-394, 654 P.2d 157]. When California submitted a State Plan to the Secretary of Labor, which was approved in 1972, and adopted the California Occupational Safety and Health Act in 1973, the only requirement was that the coverage of the Cal/OSHA Program be at least as effective in providing safety and health protection as would be accorded under the federal Act. Moreover, Labor Code section 6401, which has been interpreted by the Division and California courts to require generally that employers both provide and pay for safety equipment, was in existence in substantially similar form since 1913. (Stats. 1913, Ch. 176, section 52, p. 306—The only change as a result of the 1973 Cal/OSHA Act from the prior statute which had been in effect since 1937 was the addition of the words "healthful" and "health" to this Labor Code provision. Stats. 1937, Ch. 90, p. 308.) Prior to, and after passage of the California Occupational Safety and Health Act, courts affirmed the Division's interpretation that this section required payment as well as provision of required safety devices. *Bendix Forest Products Corporation v. Division of Occupational Safety and Health* (1979) 25 Cal.3d 465 [158 Cal.Rptr. 882, 600 P.2d 1339], *Oakland Police Officer's Association v. City of Oakland* (1973) 30 Cal.App.3d 96 [106 Cal.Rptr. 134]. Thus the California Act merely carried forward longstanding statutory and judicial expressions concerning this subject matter.

In a previous case before this Court involving the Cal/OSHA Program, *United Air Lines, Inc. v. The Division of Industrial Safety,* No. 80-1594, this Court invited the Solicitor General to file a brief expressing the views of the United States concerning a similar issue raised on a Petition for Writ of Certiorari by United Air Lines. In response to the question concerning whether the federal Act limited a state's ability to provide more expansive

jurisdiction and protection to its employees, the Solicitor General stated

> States that have adopted federally approved plans are free to conduct regulatory programs relating to occupational safety and health, subject to the maintenance of a federal enforcement presence during the initial phases of such plans. However, section 18 does not confer federal power on the states; the section merely removes federal preemption so that the states may exercise their sovereign powers over occupational safety and health. (Citations omitted)
>
> Thus, the limitations imposed on OSHA by Section 4(b)(1) of the OSH Act, 29 U.S.C. 653(b)(1), are not imported into state law, as is evident from the language of the OSH Act. Under section 18 of the OSH Act, 29 U.S.C. 667, states with approved plans are not prohibited from maintaining coverage that is more extensive or standards that are more stringent than those developed by OSHA. Amicus Brief of the Solicitor General, pp. 5-6.

In conclusion, California statutory and case law which require that employers generally both provide and pay for safety equipment is in conformance with the federal-state relationship envisaged by section 18 of the Federal Act, 29 U.S.C. 667.

V

THE ISSUES PRESENTED IN THIS LITIGATION ARE SUBSTANTIALLY DIFFERENT THAN THOSE RAISED IN THE FORT HALIFAX PACKING COMPANY DECISION

In a supplemental brief in support of its petition, Simpson argues that issues raised in an appeal of the recent decision by the Supreme Judicial Court of Maine in *Director of Bureau of Labor Standards, et al. v. Fort Halifax Packing* (1986) 510 A.2d 1054, in which this Court has noted probable jurisdiction, bear substantial resemblance to the instant case. However, a review of the facts underscoring the legal issues does not support this conten-

tion.[5] With reference to its argument that the Maine severance pay statute, 26 M.R.S.A. 625-B, is preempted by the National Labor Relations Act, 29 U.S.C. 141, *et seq.*, Appellant Fort Halifax is arguing that the Maine statutory scheme is unconstitutional. Not once at any time in the administrative or judicial proceedings pertaining to this case did Simpson ever argue that the California statutory provision which provides that an employer must generally provide and pay for required safety equipment, Labor Code 6401, *Bendix Forest Products v. Division of Occupational Safety and Health* (1979) 25 Cal.3d 465 [158 Cal.Rptr 882, 600 P.2d 1339] is *per se* an unconstitutional abridgement of the National Labor Relations Act, 29 U.S.C. 151, *et seq.*, To the contrary, Simpson has cited as authority the California Supreme Court decision in *Bendix, supra,* for the proposition that "there can be an agreement between an employer and union as to who specifically shall have to pay for safety shoes." Simpson's Petition, p 16. The entire thrust of Simpson's argument with reference to the preemption issue has been that the Division's Order impermissibly interfered with its collective bargaining agreement. As we have previously stated, the so-called collective bargaining agreement referred to a custom and practice which had become incorporated by reference in which Simpson paid partial reimbursement to employees who voluntarily chose to purchase safety shoes when the shoes were neither required by Simpson nor by the law. By referencing the *Fort Halifax* decision, *supra,* in which the state statutory scheme is being challenged as unconstitutional, Simpson raises issues which are vastly different than any which have been previously argued. At this late stage of litigation, Simpson should not be granted leave to reference issues which have been neither raised nor considered previously.

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[5] In the *Fort Halifax* case, *supra* two preemption issues were presented for review by this Court: whether the Maine severance pay provisions were preempted (1) by the Employee Retirement Income Security Act, 29 U.S.C. 1001, *et seq.*, or (2) by the National Labor Relations Act, 29 U.S.C. 151, *et seq.* In the notation of probable jurisdiction it is unclear whether the former issue, the latter issue, or both issues are under possible consideration.

Moreover, the Maine statutory scheme which provided a formula for payment of severance pay is of substantially different dimensions than the California statutory provision, which has been in existence for seven decades, which has been interpreted both by the Division and courts to require that employers provide and pay for required safety equipment. There can be little question in light of this Court's prior decision in *Terminal R. Association v. Brotherhood of R. Trainmen* (1943) 318 U.S. 1, 6-7, that a state, in the context of its regulation of occupational safety and health, can make the determination that as a general rule employers must both provide and pay for required safety equipment. The legislative determination that the provision of a safe and healthful place of employment can best be secured by this minimum standard constitutes a valid exercise of the state's police power. Because the facts and legal issues raised in the *Fort Halifax* case are substantially different than the instant case, the Division believes that this Court's action with reference to the former has no bearing with reference to the latter.

CONCLUSION

For the reasons stated, Respondent Division of Occupational Safety and Health respectfully prays that the Petition for Writ of Certiorari to review the decision of the California Court of Appeal not be granted.

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Safety and Health

Supreme Court, U.S.
FILED
DEC 16 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-750

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

SIMPSON PAPER COMPANY,
Petitioner,

VS.

DIVISION OF OCCUPATIONAL SAFETY AND HEALTH OF THE DEPARTMENT OF INDUSTRIAL RELATIONS FOR THE STATE OF CALIFORNIA,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA IN AND FOR THE THIRD APPELLATE DISTRICT

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INTRODUCTION

Respondent's brief in opposition highlights how important it is that this Court grant Simpson's petition for a writ of certiorari. That brief demonstrates that the State of California is unaware of basic federal principles of labor law and is unconcerned with the statutory scheme constructed by Congress. This reply will note how Respondent has failed to distinguish *Fort Halifax Packing Company, Inc. v. Marvin W. Ewing*, Case No. 86-1-341 ASX (hereinafter *Fort Halifax*). The reply will also show that Respondent's assumptions are contrary to federal labor law principles and will demonstrate how Respondent's reliance on *Metropolitan Life Insurance Company v. Commonwealth of Massachusetts*, 105 S.Ct. 2380 (1985), is misplaced. Most of Respondent's arguments are ad-

dressed in Simpson's petition for a writ of certiorari. This reply will not repeat those arguments.[1]

ARGUMENT

I

RESPONDENT HAS FAILED TO DISTINGUISH FORT HALIFAX

It is apparent that the National Labor Relations Act issue raised in *Fort Halifax*, a case in which this Court noted probable jurisdiction on November 10, 1986, is virtually identical to the issue raised by Simpson in the instant case. In each case, the state has altered the established bargaining relationship between the employer and the union representing its employees with respect to a mandatory subject of bargaining. In each case, the parties' respective positions regarding the economic item at issue were based on resolution of an entire wage and benefit package and became part and parcel of the parties' overall settlement and agreement. The employers in both cases maintain that federal labor law preempts the state's action.

Respondent attempts to distinguish *Fort Halifax* on the ground that the appellant in that case argued "that the Maine statutory scheme is unconstitutional" whereas Simpson allegedly did not argue that California's intrusion into the bargaining process was "per se" unconstitutional. Respondent's brief in opposition, page 19. Respondent's argument fails to acknowledge the underlying basis of every federal preemption argument. There is no dispute that at every reasonable opportunity afforded to it, Simpson has unequivocally stated its position that the State of California was preempted by the Labor-Management Relations (Taft-Hartley) Act ("LMRA"), as amended, 29 U.S.C. § 157 (1947), from interfering with the collective bargaining agreement in effect between

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[1]Simpson's rule 28.1 list is set forth at page i of its petition for a writ of certiorari.

Simpson and the Union which represents its employees. In its petition for a writ of certiorari, Simpson cited clause 2 of Article VI of the United States Constitution, also known as the "supremacy clause". Petition for a writ of certiorari, page 2. It is axiomatic that each time Simpson raised its claim of preemption that argument was based on the supremacy clause of the United States Constitution. Respondent's contention that Simpson's preemption arguments were based on something other than the supremacy clause is misplaced.

Respondent's second attempt at distinguishing the two cases also must fail. As has been stated, and will be noted hereinafter, safety is *not* and *never has been* a factor in Cal-OSHA's reasoning with respect to who must pay for the shoes in question. See Argument, II.B. and III., *infra.*

II

ACCORDING TO ESTABLISHED FEDERAL LABOR LAW, THE STATE'S ACTIONS IN THIS CASE WERE PREEMPTED

Respondent's arguments are premised upon assumptions which require the rewriting of federal labor law principles.

A. The Collective Bargaining Agreement By And Between Simpson And The Union Requires That Simpson Pay Only A Small Portion Of The Cost Of A Pair Of Shoes.

Respondent complains that the basis for Simpson's position that the collective bargaining agreement required it to pay for only a portion of the cost of a pair of shoes is that this requirement "harks back to a custom and practice which was never the subject of any collective bargaining session". Respondent's brief in opposition, page 6. Simpson has already set forth in great detail the discussions and negotiations which occurred between the Employer and the Union with respect to who would pay for the shoes in question. Petition for a writ of certiorari, pages 4-5. Even assuming, however, that such discussions

did not occur, as this Court has held repeatedly, custom and practice are as much a part of any collective bargaining agreement as are the words printed on the agreement's pages.

In *United Steelworkers v. Warrior & Gulf Navigation Company*, 363 U.S. 574, 578-580 (1960), this Court stated in this regard as follows:

> The collective bargaining agreement states the rights and duties of the parties. It is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot fully anticipate . . . The collective agreement covers the whole employment relationship. *It calls into being a new common law — the common law of a particular industry or of a particular plant.* As one observer has put it: '. . . *There are too many people, too many problems, too many unforeseeable contingencies to make the words of the contract the exclusive source of rights and duties. One cannot reduce all the rules governing a community like an industrial plant to fifteen or even fifty pages.* Within the sphere of collective bargaining, the institutional characteristics and *the governmental nature of the collective-bargaining process demand a common law of the shop which implements and furnishes the context of the agreement. We must assume that intelligent negotiators acknowledged so plain a need unless they stated a contrary rule in plain words.*' (Emphasis added, citations and footnotes omitted.)

See also NLRB v. Bildisco & Bildisco, 465 U.S. 513, 524 (1983) ("[B]ecause of the special nature of a collective-bargaining contract, and the consequent 'law of the shop' which it creates, . . . a somewhat stricter standard should govern the decision of the Bankruptcy Court to allow rejection of a collective-bargaining agreement."); *Transportation-Communication Employees Union v. Union Pacific Railroad Co.*, 385 U.S. 157, 161 (1966) ("In order to interpret such an agreement it is necessary to consider the scope of other related collective bargaining agree-

ments, as well as the *practice, usage* and *custom* pertaining to all such agreements" (emphasis added)); *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 550 (1964) (collective bargaining agreement "is not an ordinary contract"); *Smith v. Kerrville Bus Co., Inc.*, 709 F.2d 914, 920 (5th Cir. 1983) ("It is well-established that § 301 must be broadly construed to encompass any agreement, *written or unwritten, formal or informal,* which functions to preserve harmonious relations between labor and management." (emphasis added)).

Moreover, it is neither this Court's province nor Cal-OSHA's to determine what is and what is not within the collective bargaining agreement. That is solely the task of the parties' chosen arbiter. *United Steelworkers v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 599 (1960). In this case, just such an Arbitrator, Mr. Sam Kagel, was called upon to make that decision, and he clearly and unequivocally stated at page 5 of his Opinion and Decision, as follows:

> *The past practice* relative to some payment for safety shoes *is of such duration* that *it has in effect become part of the agreement between the parties* and this is specifically so in that the company increased the amount of reimbursement as a result of the direct request of the union. (emphasis added.)[2]

Thus, one of the key bases for Respondent's arguments is erroneous as a matter of federal law and belied by Mr. Kagel's Decision.

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[2]Moreover, contrary to the erroneous claims of the Respondent, this decision was rendered when the wearing of safety shoes was mandatory in the Employer's finishing department. Indeed, the grievance which resulted in the Arbitration was filed *because of* the Employer's decision to make the wearing of safety shoes mandatory there. Compare Respondent's brief in reply, page 3 with pages 4, 7.

B. The State Of California's Notions With Respect To How Collective Bargaining Should Proceed Highlight The Soundness Of Simpson's Petition For A Writ Of Certiorari.

Respondent's notions of how collective bargaining should work lead it to claim that bargaining about the cost of the shoes in question "must begin with the employer acknowledging the concommitant duty to provide and pay for required safety devices. Absent such an acknowledgement on the employer's part, there could be no *meaningful* bargaining away or waiver of such a statutory entitlement." Respondent's brief in opposition, page 8 (emphasis added). Respondent continues by stating that the absence of such a precondition not only makes the negotiating not "meaningful" but, in addition, puts the Union "in the position of imploring or begging the employer to fulfill its statutory duties. . . ." *Id.*

Once again, Respondent's argument is based on assumptions which, simply stated, impede federal law and interfere with the collective bargaining process. One secret to the success of collective bargaining in the fifty years since the enactment of the Wagner Act has been that, generally speaking, once negotiations have begun, Congress and the National Labor Relations Board (hereinafter also the "NLRB" or "Board") have left the parties to their own devices to work out an agreement or not as befits their relative bargaining power. It has not been Congress' or the Board's concern who it is who goes "begging" or "imploring" on one issue or the other. Neither Congress nor the Board has erected sterile or rigid rules for the bargaining process, or the requirement of "acknowledgments". Neither Congress nor the Board has been concerned about "meaningful" negotiations, whatever that means, so long as the parties meet and bargain in good faith. More important, *it is only Congress* which has the right to alter the bargaining process. Cal-OSHA has neither the right nor the expertise to suggest how negotiations should proceed or what would make them more "meaningful".

Furthermore, Respondent undercuts its own argument by emphasizing the importance of the bargaining process, for that is a matter solely within the jurisdiction of Congress to address. Neither Cal-OSHA nor the court below is saying that Simpson and the Union were precluded from agreeing that Simpson's employees, and not Simpson, would pay for the shoes in question. To the contrary, Respondent implies that would be perfectly acceptable to it, if only its notion of proper labor negotiations were permitted to take the place of Congress. Just as Cal-OSHA's vision of "custom and practice" must give way to the federal law, so must its notions of what it believes to be "meaningful" bargaining. Federal law does not, and should not, permit such interference by state agencies or courts.

Finally, Respondent's position belies its claim that safety is, or ever was, a factor in the issue of who is to pay for the shoes. *If safety were the issue, then Cal-OSHA could not tolerate employees paying for their shoes no matter how that end result occurred.* But it is not the end result that concerns Respondent. Rather, it is Respondent's belief it can improve upon the federal bargaining process. Respondent is not attempting to enforce a safety-related issue; it is attempting to interfere with the bargaining process, it is attempting to alter the parties' economic package and it is attempting to add rules and restrictions to the bargaining process which only Congress can authorize by and through the National Labor Relations Board.

The State of California is meddling in areas and with matters without the right, expertise or justification to do so. Nothing makes this clearer than its positions before this Court.

III

SAFETY IS NOT AND NEVER HAS BEEN AN ISSUE IN THIS CASE

As has been maintained by Simpson throughout, and as is noted *supra,* safety is not and has not been the basis for

Cal-OSHA's position or the alleged justification for it. *See* petition for a writ of certiorari, page 12, n.5, pages 12-13. Simpson does not dispute that safety shoes should be worn by all employees covered by the Order to Take Special Action.[3] Cal-OSHA's after the fact attempt to justify its position as being safety-related is not supported by the record or by Cal-OSHA's prior litigation position. *Id.* Paying for the shoes in question is a bargaining issue, not a safety-related one.

IV

METROPOLITAN LIFE INSURANCE DOES NOT APPLY TO THIS CASE

This Court, in *Fort Halifax,* rejected Maine's claim that *Metropolitan Life Insurance Company v. Commonwealth of Massachusetts,* 105 S. Ct. 2380 (hereinafter *Metropolitan*), applied to that case. For like reasons, *Metropolitan* does not apply to the instant case.

First, the statute in *Metropolitan* did not act so as to alter a *preexisting* collective bargaining relationship or agreement. The established relationship between the Employer and Union in this case, as determined by the labor Arbitrator who was asked to resolve the issue, makes this case different from *Metropolitan.* Stated another way, assuming *arguendo* the State of California could have required Simpson to pay for the cost of safety shoes when no collective bargaining agreement was in effect, it clearly cannot do so after the economic terms and conditions of its agreement have been established subsequent to good faith collective bargaining.

Second, in *Metropolitan* this Court accepted the state's requirement that group insurance include mental health

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[3]It is true that at one point Simpson claimed that toecaps were as safe as safety shoes. Nevertheless, this position was abandoned early in the litigation and all subsequent arguments regarding the cost of a pair of safety shoes have assumed that safety shoes should be worn by the employees in question. Respondent's contentions to the contrary at footnote 4 are, simply stated, baseless.

care insurance as being legitimate and rational. In this case there is no safety-related or other legitimate state issue. California's stated concerns in this case address how negotiations should proceed or whether the Employer must first "acknowledge" it had a statutory duty before it could "meaningfully" negotiate with respect to the limits of that duty. These are Congressional concerns which go to the heart of the collective bargaining process. They are not rational or legitimate concerns of the State of California.

Third, in *Metropolitan,* the state gave the parties to the collective bargaining process the clear and unfettered choice of providing no insurance, thereby avoiding the effect of the statute. 105 S. Ct. at 2394. In this case, no choice is permitted. The state has held that Simpson's employees must wear the shoes. So long as Simpson has employees, it has no choice but to pay for the shoes, according to Cal-OSHA.

Fourth, *Metropolitan* involves a statute of general application which affected any person purchasing a certain type of insurance. It was not limited to employers and its purpose was not to affect bargaining. The Order to Take Special Action in this case, however, applies to one employer and does affect, and interfere with collective bargaining. Therefore, whereas the statute in *Metropolitan* could be justified as a result of its general, statewide effect, the result of the Order to Take Special Action in this case prevents Cal-OSHA's making any such argument.

Fifth, the statute in *Metropolitan* provided a *minimum standard* for health insurance benefits. *See also Industrial Welfare Commission v. Superior Court,* 27 Cal.3d 69 (1980), and other cases cited by Respondent at pages 8-10 of its brief in opposition. The order in the instant case is not a minimum standard. It requires that Simpson pay *all* of the costs of its employees' safety shoes. Far from

being a minimum standard, it is a state ordered maximum requirement.[4]

CONCLUSION

For all of the foregoing reasons, and for the reasons set forth in Simpson's prior filings, Simpson's petition for a writ of certiorari should be granted. Cal-OSHA's interference with the bargaining process in this case will undoubtedly lead to exactly the same meddling with respect to other employers in other industries. Moreover, encouraged by their new-found power, bureaucratic institutions across the country will start adding their rules, requirements, touches and glosses to the bargaining process. Employers and unions will be unable to reach agreements, or know when agreements they have reached, even on critical economic issues, will be final and binding. Therefore, this Court must grant Simpson's petition for a writ of certiorari to clarify the limits of state bureaucratic intrusion into the federal collective bargaining process. Employers and unions throughout the country must be assured that their agreements, resulting from hard fought and trying negotiations, will not be undone because a state agency objects to the bargaining process.

Respectfully submitted,

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[4]The suggestion that the IWC case which approved a minimum wage for all employers somehow controls this case is totally unfounded for the reasons previously expressed, and because Cal-OSHA's position does not impose a minimum wage. As previously noted, it also is not safety-related.

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On December 16, 1986, I served the within Reply Brief in re: "Simpson Paper Company vs. Division of Occupational Safety and Health of the Department of Industrial Relations for the State of California" in the United States Supreme Court, October Term 1986, No. 86-750;

on the Parties in said action, by placing three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

Michael D. Mason
Division of Occupational Safety and Health
525 Golden Gate Avenue, Room 616
San Francisco, California 94102

All Parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on December 16, 1986, at Los Angeles, California

Ce Ce Medina

CE CE MEDINA